No. 16-1137

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA,

Plaintiffs - Appellees

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants - Appellants

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his capacity as Chairman of the Massachusetts Gaming Commission,

Third Party - Defendants

On Appeal from the
U.S. District Court for the District of Massachusetts
(CASE NO: 1:13-cv-13286-FDS)

APPELLANTS OPENING BRIEF

Scott Crowell
Crowell Law Offices
Tribal Advocacy Group
1487 W. State Route 89A,
Suite 8
Sedona, AZ 86336
425-802-5369
scottcrowell@hotmail.com

Lael Echo-Hawk
Hobbs Straus Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282
LEcho-Hawk@hobbsstraus.com

Counsel for Appellants

CORPORATE DISCLOSURE STATEMENT

The Wampanoag Tribe of Gay Head (Aquinnah); the Wampanoag Tribal Council of Gay Head, Inc.; and the Aquinnah Wampanoag Gaming Corporation pursuant to Fed. R. App. P. 26.1, certify that it has no parent corporation and certifies that it has no stock and therefore no publicly held corporation owns 10% or more of its stock.

s/ Scott D. Crowell
SCOTT D. CROWELL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Resources

STATEMENT WHY ORAL ARGUMENT SHOULD BE PERMITTED

Appellant Aquinnah Tribe, pursuant to 1st Cir. R. 34.0(a), requests that the Appeals Court permit oral argument because (i) this is a matter a great importance to the Tribe and its members; (ii) the District Court's Order requires the application and interpretation of two prior decisions of this Court, which reached different results; (iii) none of the exceptions set forth in Local Rule 34(a)(2) apply; and (iv) most importantly, the Tribe believes that the decisional process would be significantly aided by oral argument.

May 28, 2016

s/ Scott D. Crowell
SCOTT D. CROWELL

I. JURISDICTIONAL STATEMENT

This lawsuit originated in Supreme Judicial Court for Suffolk County, Massachusetts and was removed by Appellants pursuant to 28 U.S.C. § 1331, 1441 and 1446. The case was removed because resolution of the issues, including the pendant state law claims, required determinations of federal law. The District Court had federal subject matter jurisdiction over the lawsuit pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction to the Commonwealth's state law claims pursuant to 28 U.S.C. § 1367. The District Court had federal subject matter jurisdiction over the counterclaims filed in this lawsuit pursuant to 28 U.S.C. § 1331.

This Appeals Court has appellate jurisdiction under 28 U.S.C. § 1291.

Final Judgment was entered by the District Court on January 5, 2016. The Notice of Appeal was timely filed on February 1, 2016, within the thirty days allowable for a timely notice of appeal. 28 U.S.C. § 2107(a).

The appeal is from a final judgment that disposes of all parties' claims.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in ruling that MILCSA(Aquinnah)'s[1] application of the Commonwealth's gaming laws remains in effect; IGRA[2] preempts prior legislation regarding gaming on Aquinnah Indian lands.

B. Whether the District Court erred in concluding that the Tribe's struggling efforts to establish and expand its governmental presence are deficient for the Tribe's Indian lands to qualify under IGRA; Aquinnah exercises sufficient governmental power over its Indian lands.

C. Whether the District Court erred in concluding that the Commonwealth's lawsuit could proceed without the National Indian Gaming Commission ("NIGC)" as a party; the United States continues to assert jurisdiction over gaming activities on Aquinnah Indian lands to the exclusion of the Commonwealth.

---

[1] Three different Indian Land Claim statutes are discussed extensively throughout this Opening Brief. To facilitate the reading of the brief, the acronyms of the different statutes are followed by a parenthetical that identifies the Tribe or Tribes

[2] The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.

III. CONCISE STATEMENT OF THE CASE

The crux of this appeal is the whether Congress' enactment of IGRA, and its comprehensive provisions of federal law governing gaming on Indian lands impliedly repealed those provisions in MILCSA(Aquinnah), which had applied the gaming laws and regulations of the Commonwealth to Aquinnah Indian lands. If IGRA applies, the inquiry turns to whether Aquinnah's exercise of governmental power over its Indian lands sufficient for the lands to qualify for gaming under IGRA.

Factual Summary: The Wampanoag Tribe of Gay Head (Aquinnah) is a federally-recognized Indian tribe with trust lands in Dukes County, Massachusetts. The members are direct descendants of the Wampanoag people who have occupied the area since time immemorial.

On September 28, 1983, the Wampanoag Tribal Council of Gay Head, Inc. entered into a Memorandum of Understanding ("MOU") Concerning Settlement of Gay Head, Massachusetts Indian Land Claims with the Town of Aquinnah (formally Town of Gay Head) and the Taxpayers' Association of Gay Head, Inc., resolving a multi-year litigation over aboriginal title to lands located on Martha's Vineyard. (App. Vol. I, 182 at ¶¶11 & 12). For clarification purposes, it is important to note that the Tribe achieved its federally-recognized status on April 11, 1987 through the formal administrative process administered by the

Department of the Interior (App. Vol. I, 182 at ¶¶14-17), and not through the MILCSA(Aquinnah), which was enacted by Congress six months later on August 18, 1987 (App. Vol. I, 182 at ¶¶18–20). MILCSA(Aquinnah) did not confer federal recognition upon the Tribe, but rather, resulted in the Settlement Lands being set aside for the benefit of the Tribe, while extinguishing the Tribe's aboriginal title to lands on Martha's Vineyard. However, many aspects of the were imposed upon the newly federally-recognized Tribe in MILCSA(Aquinnah), 25 U.S.C. 1771 et seq.(App. Vol. I, 182 at ¶18).

In 1988, slightly more than a year after enactment of the MILCSA(Aquinnah), Congress enacted IGRA, establishing a regulatory scheme for Indian gaming in the United States, and creating the National Indian Gaming Commission ("NIGC"), an independent federal regulatory agency within the Department of Interior, to oversee IGRA's administration. In compliance with IGRA, in 2012 the Tribe adopted Gaming Ordinance 2011-01, authorizing gaming activities on the Settlement Lands, as conducted in accordance with IGRA and its implementing regulations (App. Vol. I, 182 at ¶37-39). The United States thereafter approved the Tribe's Gaming Ordinance and issued two legal opinions confirming the Tribe's authority to conduct gaming on the Settlement Lands. First, on August 23, 2013, the Tribe received an opinion letter from the Department of Interior's Office of the Solicitor concluding that the MOU effectuated in part as

MILCSA(Aquinnah), does not prohibit the Tribe from conducting Indian gaming on its Settlement Lands pursuant to IGRA (App. Vol. I, 182 at ¶¶52 & 53). Subsequently, on October 25, 2013, the Tribe received an additional opinion letter from the NIGC's Office of General Counsel concluding that the Settlement Lands are eligible for Indian gaming under IGRA (App. Vol. I, 182 at ¶¶ 58 & 59).

Discussed in greater detail in the argument section below, the Aquinnah Tribe has submitted to the record volumes of ordinances and inter-governmental agreements, and has submitted the transcript of the deposition of Tribal Chairman Tobias Vanderhoop, which evidence the Tribe's exercise of governmental power over Aquinnah Indian lands. Whether that record is sufficient to establish that the Tribe exercises sufficient governmental power for the lands to qualify for gaming is a key issue in dispute in this appeal.

When the Tribe informed the Commonwealth that it would proceed with the establishment of a Class II gaming facility on Aquinnah Indian lands under IGRA in order to generate the needed governmental revenue to fund and establish a myriad of needed governmental programs and opportunities for its members, the Commonwealth responded by filing an action against the Tribe in the Commonwealth's Supreme Court.

Procedural Summary: On December 2, 2013, the Commonwealth filed a Complaint with the Single Justice of the Supreme Judicial Court for Suffolk

County against the Tribe. The Complaint asserts a claim for breach of contract and request a declaratory judgment that the MOU allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands.

On December 30, 2013, the Tribe removed the action to the District Court on grounds of federal-question and supplemental jurisdiction (App. Vol. I, 1). On January 29, 2014, the Commonwealth moved to remand the action to state court (App. Vol. I, 9), which the District Court denied on July 1, 2014 (App.Vol. I, 11).

On July 10, 2014, both the AGHCA and the Town filed motions to intervene (App. Vol. I, 24-42). The District Court granted those motions on August 6, 2014 (App. Vol. I, 69).

On August 27, 2014, the Tribe moved to dismiss the AGHCA complaint on the grounds of sovereign immunity and failure to state a claim upon which relief can be granted (App. Vol. I, 70-73). On that same day, the Tribe separately moved to dismiss all three complaints, with leave to amend, for failure to join the United States, which the Tribe asserted was a required party under Fed.R.Civ.P. 19 (App. Vol. I, 87- 90).

On October 24, 2014, the Tribe filed an amended answer to the Commonwealth's complaint (App. Vol. I, 103-116). The amended answer included counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in

their official capacities under *Ex Parte Young*. 209 U.S. 123 (1908). The counterclaims sought declaratory and injunctive relief concerning the Commonwealth's assertion of jurisdiction over gaming that occurs on the Tribe's trust lands. On November 19, 2014, the Commonwealth and the third-party defendants moved to dismiss the counterclaims (App. Vol. I, 134-137).

On February 27, 2015, the District Court denied the Tribe's motions to dismiss, including the motion based on Fed.R.Civ.P. 19, and granted the motion by the Commonwealth to dismiss the counterclaims against it. Remaining are the claims by the Commonwealth, the AGHCA, and the Town against the Tribe, and the Tribe's counterclaims against the government officials (App. Vol. I, 149). The February 27, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On April 22, 2015, all parties filed a Stipulation of Facts Not in Dispute, (App. Vol. I, 182). On May 28, 2015, the Commonwealth, the Town, the AGHCA, and the Tribe all moved for summary judgment (App. Vol. I, 238-316). On November 13, 2015, the District Court granted the motions of the Commonwealth, the Town and AGHCA and denied the Tribe's motion (App. Vol. II, 343). The November 13, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On December 11, 2015, the Tribe filed a Motion for Reconsideration of both the Order of February 27, 2015 and the Order of November 13, 2015 (App. Vol. II, 383). On December 23, 2015, the District Court denied the Motion for Reconsideration (App. Vol. II, 405). The November 13, 2015 Order is one of the Orders to which the Tribe alleges error in this appeal.

On January 5, 2016, the District Court entered Final Judgment and this appeal ensued.

IV. SUMMARY OF ARGUMENT

Appellants[3] Wampanoag Tribe of Gay Head (Aquinnah) and the Aquinnah Wampanoag Gaming Corporation (collectively "Aquinnah" or "Tribe") secured all the proper approvals required by IGRA and the regulations promulgated by the NIGC for the Tribe to proceed with establishing and operating a Class II-only[4]

[3] Although the Complaints named the Wampanoag Tribal Council of Gay Head, Inc. as a party defendant, alleging that the Wampanoag Tribe of Gay Head (Aquinnah) "includes" Wampanoag Tribal Council of Gay Head, Inc., which no longer exists, the Tribe denies that allegation. The District Court did not address the issue. However, if such allegation is true, and Defendant Wampanoag Tribe of Gay Head (Aquinnah) has the capacity for pleading on behalf of Wampanoag Tribal Council of Gay Head, Inc., then this pleading shall also be considered to be filed on behalf of Wampanoag Tribal Council of Gay Head, Inc.

[4] IGRA divides gaming into three categories: Class I includes traditional games and is regulated exclusively by the Tribe; Class II, at issue here, includes bingo and similar games, as well as non-banked card games, and is regulated by the Tribe and the NIGC. Class III gaming includes slot machines and banked table games and is governed by the terms of agreed-upon and approved Tribal/State compacts. 25 U.S.C. § 2703(6-8).

gaming facility on its Indian lands in County of Dukes County, Massachusetts. Due to the unwillingness of the Legislature in the 1990's and more recently, the Patrick and Baker Administrations to negotiate a gaming compact with the Tribe, Aquinnah chose to proceed with a Class II gaming facility because Class II gaming is exclusively governed by federal and tribal law, to the exclusion of the Commonwealth.

In the wake of Aquinnah securing final federal approvals, which resulted in two legal opinions being issued by the United States Department of the Interior and the NIGC stating that IGRA, and not MILCSA(Aquinnah), governs gaming on Aquinnah Indian lands, the Commonwealth, rather than seeking proper redress against the NIGC in federal court under the Administrative Procedures Act, 5 U.S.C. §§ 500 et seq. ("APA"), filed a lawsuit against the Tribe in the Commonwealth's Supreme Court. The Tribe removed the action to federal court, and the Town of Aquinnah and the Aquinnah Gay Head Community Association ("AGHCA") intervened.

Aquinnah finds three critical errors in the District Court's rulings against the Tribe. The District Court erred (1) in its Order dated February 27, 2015, when it denied the Tribe's motion to dismiss with leave to amend to include the NIGC as a party pursuant to Fed.R.Civ.P. 19; (2) in its Order dated November 13, 2015, when it granted cross-motions for summary judgment in favor of the Commonwealth, the

Town of Aquinnah and the AGHCA, and against the Tribe; and (3) in its Order of December 23, 2015, when the District Court denied the Tribe's motion for reconsideration based on recent developments between the NIGC and two tribes with Indian lands in Texas.

First, the District Court erred when it ruled that the MILCSA(Aquinnah), rather than IGRA, governs the Tribe's gaming activities on the Tribe's Indian lands in Dukes County (often referred to as the "Settlement Lands"). As a federally-recognized Indian tribe subject to the plenary authority of the United States Congress, Aquinnah is entitled to benefit from subsequent acts of Congress in its legislation of Indian affairs. IGRA's provisions, particularly as they relate to Class II gaming, which is governed exclusively by federal and tribal law, are inherently repugnant to the application of the Commonwealth's gaming laws that were previously applicable under MILCSA(Aquinnah). The District Court reasoned that certain parenthetical language which acknowledges the obvious, that the civil and criminal laws of the Commonwealth include the Commonwealth's laws regarding gaming, allows the District Court to avoid its obligation of following the clear law articulated by this Appeals Court in *Narragansett.* The District Court instead treats the parenthetical language as if it has the exact same meaning as the language in MICA(Maine), where Congress explicitly stated by express language that subsequent acts of Congress intended for the benefit of Indians would not apply to

Maine tribes unless the subsequent legislation also explicitly stated that it was intended to apply to the Maine tribes.

Second, the District Court erred by ruling that even if IGRA does apply to Aquinnah Indian lands, the Tribe does not exercise its governmental power over those lands in a manner sufficient for the lands to qualify for gaming under IGRA. Rather than follow the direction of this Appeals Court in *Narragansett*, and rather than defer to the federal agencies' determinations that Aquinnah does exercise sufficient governmental power over its Indian lands, the District Court fiats a new and extremely difficult standard. This new standard requires that an Indian tribe have "itself" the immediate capability to provide all needed governmental services to its gaming facility, including tribal law enforcement with the inherent authority to enforce state laws. This new standard rejects the established and frequent use of intergovernmental agreements with non-Indian governments to make sure that needed governmental services are provided.

Third, the District Court erred by twice denying the Tribe's motion under Fed.R.Civ.P. 19 to dismiss the claims against the Tribe with leave to amend to bring the NIGC into the litigation. The United States continues to exercise jurisdiction over gaming on Aquinnah Indian lands to the exclusion of the Commonwealth. Accordingly, the decisions of the District Court, if upheld on appeal, place Aquinnah in an untenable "Catch-22" position wherein proceeding

with gaming under the laws of the Commonwealth will risk enforcement action by the United States and proceeding with gaming under IGRA will similarly risk enforcement action by the Commonwealth and/or the Town of Aquinnah. The District Court initially, on February 27, 2015, denied the Tribe's motion on grounds that the Tribe was unable to show that there was a "substantial risk" the Tribe would face such conflicting circumstances. In October of 2015, the NIGC approved Class II Gaming Ordinances for two Texas Tribes, and in that process, issued a legal opinion that it was asserting jurisdiction to the exclusion of the State of Texas, despite the fact that the Fifth Circuit had ruled in litigation between the State of Texas and the Texas Tribes where the United States was not a party, that Texas law rather than IGRA governed gaming activities on the Texas Tribes' Indian lands. Despite this development of a very real and indisputable "substantial risk," the District Court denied the Tribe's motion.

All three material errors of the District Court, separately and collectively, require that the decisions of the District Court be vacated and reversed.

V. ARGUMENT

A. Standard of Review.

The standard of review of the District Court's rulings on motions for summary judgement is *de novo*. In conducting a "fresh look" at the record, the Appeals Court views the evidence in the light most favorable to the non-moving

party, and draw all reasonable inferences in its favor. Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. To determine whether a trial-worthy issue exists, the Appeals Court looks to all of the record materials on file, including the pleadings, depositions, and affidavits. *Hicks v. Johnson,* 755 F.3d 738 (1st Cir. 2014).

The standard of review of the District Court's denial of the Tribe's motion based on Fed.R.Civ.P. 19 is abuse of discretion. An abuse of discretion exists when the district court makes an error of law, or "relies significantly on an improper factor, omits a significant factor, or makes a clear error of judgment in weighing the relevant factors. *Picciotto v. Continental Cas. Co*., 512 F.3d 9, 15 (1st Cir. 2008).

B. IGRA Preempts Prior Legislation Regarding Gaming on Aquinnah Indian Lands: The District Court Erred in Ruling that MILCSA(Aquinnah)'s Application of the Commonwealth's Gaming Laws Remains In Effect.

1. Application of the First Circuit's Precedent: IGRA Preempts MILCSA(Aquinnah) Regarding Gaming Activity on Aquinnah Indian Lands.

a. The Federal Statutes at Issue: IGRA, MILCSA(Aquinnah), RIILCSA(Narragansett), and MICA(Maine).

The crux issue before this Appeals Court is whether Congress, in the passage of IGRA, impliedly repealed the gaming provisions of MILCSA(Aquinnah). Twice

before, this First Circuit Appeals Court has addressed very similar questions: First, in *Rhode Island v. Narragansett*, 19 F.3d 685 (lst Cir.1994), this Court held that IGRA impliedly repealed the provision in "RIICSA(Narragansett), which mandated that the settlement lands "shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.[5] Second, in *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790-91 (1st. Cir. 1996), this Court held that IGRA did not impliedly repeal the provision in MICA(Maine) which mandated that the Maine tribes "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." 25 U.S.C. § 1725(a). The sole reason for the two different results is that MICA(Maine) also included a provision that expressly limited the circumstances wherein a subsequent act of Congress intended for the benefit of Indian tribes applied to the tribes in Maine:

> The provisions of any federal law enacted after October 10, 1980 [the effective date of the Settlement Act], for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, ... shall not apply

[5] In 1996, the RIICSA (Narragansett) at Section 1708 was amended to expressly preclude Narragansett's Indian lands from qualifying under IGRA. That amendment was a direct result of the First Circuit issuing its opinion in *Narragansett*. No similar amendment has been made to the MILCSA(Aquinnah) at issue here. The 1996 Narragansett Amendment underscores the Appellees' appropriate venue for seeking their desired result; the United States Congress.

> within the State of Maine, *unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.*

25 U.S.C. § 1725(b) (emphasis added).

The relevant language in MILCSA(Aquinnah) and RIILCSA(Narragansett) are very similar to one another. RIILCSA(Narragansett) states:

> [T]he settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island."

25 U.S.C. § 1708. MILCSA(Aquinnah) states:

> The Settlement lands shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. §§ 1771g. In sharp contrast, MICA(Maine) provides the above-stated express savings clause, 25 U.S.C. 1725(b). No similar clause appears in either RIICLSA(Narragansett) or MILCSA(Aquinnah). It is on the basis of that material distinction that the First Circuit held that its analysis in *Narragansett* does not yield the same result for the Maine tribes:

> This realization gets the grease from the goose. The text of the Gaming Act contains not so much as a hint that Congress intended to make that Act specifically applicable within Maine.

75 F.3d at 789.

The analysis here is straightforward. Congress could have imposed the very same savings clause on Aquinnah in MILCSA(Aquinnah), but did not do so.

Accordingly, the same analysis the Court applied to RIILCSA (Narragansett) should also be applied to MILCSA(Aquinnah), yielding the same result as in *Narragansett*, and avoiding the same result as in *Passamaquoddy*.

b. The Law of Implied Repeals

In the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter, the courts should give effect to both, if that is feasible. *See Narragansett*, 19 F.3d at 703; *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43, 92 S. Ct. 2247, 2272 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall) 88, 92 (1871). In other words, so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective. *See Narragansett*, 19 F.3d at 703; *Traynor v. Turnage*, 485 U.S. 535, 547-48, 108 S. Ct. 1372, 1381-82 (1988). However, "if the two [acts] are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Narragansett*, 19 F.3d at 703; *Tynen*, 78 U.S. (11 Wall) at 92. Even absent outright repugnancy, repeal may be implied in cases where the later statute covers the entire subject "and embraces new provisions, plainly showing that it was intended as a substitute for the first act." *Narragansett*, 19 F.3d at 703-704; *Tynen*, 78 U.S. (11 Wall) at 92.

Applying these standards, the First Circuit concluded that IGRA impliedly repealed the RIILCSA (Narragansett) as to gaming activities on Narragansett's Indian lands:

> It is evident that the Settlement Act and the Gaming Act are partially but not wholly repugnant. The Settlement Act assigned the state a number of rights. Among those rights—and by no means one of the rights at the epicenter of the negotiations leading up to the Act—was the non-exclusive right to exercise jurisdiction, in all customary respects save two, (citation omitted), over the settlement lands. The Gaming Act leaves undisturbed the key elements of the compromise embodied in the Settlement Act. It also leaves largely intact the grant of jurisdiction—but it demands an adjustment of that portion of jurisdiction touching on gaming. Even in respect to jurisdiction over gaming, the two laws do not collide head-on. Thus, in connection with class III gaming, the Gaming Act does not in itself negate the state's jurisdiction, but, instead, channels the state's jurisdiction through the tribal-state compact process. It is only with regard to class I and class II gaming that the Gaming Act *ex proprio vigore* bestows exclusive jurisdiction on qualifying tribes. And it is only to these small degrees that the Gaming Act properly may be said to have worked a partial repeal by implication of the preexisting statute. In the area in which the two laws clash, the Gaming Act trumps the Settlement Act for two reasons. First, the general rule is that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse. See *Watt v. Alaska*, 451 U.S. 259, 266, 101 S.Ct. 1673, 1677 (1981); *Tynen*, 78 U.S. (11. Wall.) at 92; see also 2B (Norman J) Singer, Sutherland on Stat. Const., § 51.02, at 121 (5th ed. 1993). Second, in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent. Here, reading the two statutes to restrict state jurisdiction over gaming honors the Gaming Act and, at the same time, leaves the heart of the Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction over gaming on the settlement lands—would honor the Settlement Act, but would do great violence to the essential structure and purpose of the Gaming Act. Because the former course

> keeps disruption of congressional intent to a bare minimum, that reading is to be preferred. Based on our understanding of the statutory interface, we hold that the provisions of the Indian Gaming Regulatory Act apply with full force to the lands in Rhode Island now held in trust by the United States for the Narragansett Indian Tribe.

19 F.3d at 704-705. This same analysis leads to the same result when applying MILCSA(Aquinnah) at issue here to IGRA.

IGRA and MILCSA(Aquinnah) cannot be read in harmony and are therefore repugnant. MILCSA(Aquinnah) clearly applies Commonwealth law, including gaming law, to the Settlement Lands. 25 U.S.C. § 1771g. This application grants the Commonwealth "the non-exclusive right to exercise jurisdiction" over the Settlement Lands and limits the exercise of the Tribe's jurisdiction to that which conforms to Commonwealth law. *Id.*.

IGRA provides an entirely different framework than MILCSA(Aquinnah) for the Tribe's gaming activities. IGRA mandates exclusive tribal jurisdiction over the Tribe's Class I and Class II gaming. 25 U.S.C. § 2710(a). Although IGRA may permit the Commonwealth to exercise its jurisdiction over Class III gaming as prescribed and negotiated under the terms of an approved tribal-state compact, 25 U.S.C. § 2710(d), such exercise is still dependent on the Tribe entering into such an agreement in accordance with IGRA's terms[6]. Congress in the passage of IGRA

[6] The Tribe has pursued a tribal/state compact with the Commonwealth, (App. Vol. I, 182 at ¶¶29–35, which compact would provide an opportunity for the

expressly provided that the only mechanism by which state law may govern tribal gaming activities on Indian lands is by means of a negotiated tribal-state compact approved by the Department of the Interior. *See Sycuan Band v. Roache*, 54 F.3d 535, 538 (9th Cir.1995); S.Rep. No. 446, 100th Cong.2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075-76 ("[U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.").

Since *Narragansett*, the First Circuit has been consistent in applying these same criteria and while acknowledging that implied repeals are disfavored, has found implied repeals where the requisite criteria are met. *See Greenpack of Puerto Rico Inc. v. American President Lines,* 684 F.3d 20, 24 n.4 (1st Cir. 2012); *Greenless v. Almond*, 277 F.3d 601, 608 (1st Cir. 2002); *Granite State Chapter v. Federal Labor Relations Authority*, 173 F.3d 25 (1st Cir. 1999); *Complaint of Metlife Capital*, 132 F.3d 818 (1st Cir. 1997).

Commonwealth to exercise jurisdiction over Class III gaming on the Tribe's Indian lands. However, the Commonwealth rejected the Tribe's requests. Accordingly, the Tribe has restricted its gaming activities in its Gaming Ordinance to Class II gaming activities, which are governed and regulated by the Tribe and the federal government, to the exclusion of the State.

2. The District Court Erred in Ruling that MILCSA(Aquinnah)'s Provisions applying the Commonwealth's Gaming Laws to Aquinnah Indian Lands Remain In Effect.

The District Court below transformed/morphed/mutated the illustrative parenthetical language in MILSCA (Aquinnah) into an express savings clause that renders the same result as the express language in MICA(Maine). It is at this juncture that the District Court clearly erred. The District Court seized upon the parenthetical language in MILCSA(Aquinnah) that is not in RIILCSA (Narragansett), and elevated the parenthetical to have the exact same effect as the savings clause in MICA(Maine):

> That parenthetical is critical. It singlehandedly takes a law that, like the Rhode Island Settlement Act in *Narragansett*, is otherwise a general grant of jurisdiction, and transforms it into a law that specifically prohibits gaming on the Settlement Lands. By its plain meaning, the Massachusetts Settlement Act is a federal law that specifically prohibits gaming on the Settlement Lands

App. Vol. II, 343 at 31.

> The statutes are "capable of co-existence because the Settlement Act's parenthetical triggers IGRA's exemption.

App. Vol. II, 343 at 32.

The District Court's analysis should not survive the scrutiny of this Appeals Court. In addition to setting out the straightforward analysis regarding implied repeals set forth above, Aquinnah finds ten specific errors in the District Court's analysis in its Order of November 13, 2015 (App. Vol. II 343).

First, the language at issue does not prohibit gaming on Aquinnah lands. Rather it subjects the Tribe to the Commonwealth's gaming laws. Those laws do not prohibit gaming on Aquinnah lands. Indeed, the law of the Commonwealth since 2011 embraces and taxes full blown casino-resort gaming and slot parlors, Mass. Gen. Laws, ch. 23K ("Massachusetts Expanded Gaming Act"). Pursuant to the Massachusetts Expanded Gaming Act, the Commonwealth has entered into a gaming compact with the Mashpee Wampanoag Tribe of Massachusetts for gaming on lands yet-to-be taken into trust status. Federal Register, vol.79, No. 22, Monday, February 3, 2014 at p. 6213. The law allows for the Commonwealth to reach a similar agreement with Aquinnah Mass General Laws, ch. 23K, §67. Separately, Mass. Gen. Laws ch. 10, §§ 22-35A allows for thousands of outlets for the expansive Massachusetts Lottery, one of the oldest and most successful lotteries in the country, including a keno game every four minutes. Still further, Mass. Gen. Laws ch. 10, §§ 37-38 allows for charitable gaming including bingo, Las Vegas nights, raffles and charitable pull tabs. Further still, Mass. Gen. Laws ch. 128A allows for horse and greyhound dog pari-mutuel racing. It would be more appropriate for the parenthetical language in MILCSA(Aquinnah) to be characterized as expressly authorizing gaming. See also the Solicitor's Opinion (App. Vol. I, 213 at n.95) "Although section 1771g of the Settlement Act does specifically apply Commonwealth gaming law to the Settlement Lands, it does not

'prohibit' gaming activity").

Second, the District Court's conclusion that the parenthetical language changes the analysis when both statutes, RIILCSA(Narragansett) and MILCSA(Aquinnah) apply state gaming laws to Indian lands, is inexplicable and erroneous. In *Narragansett*, this First Circuit Appeals Court found RIILCSA (Narragansett)'s provision regarding the civil and criminal laws of Rhode Island to include Rhode Island's gaming laws and regulations, including local laws because local government derives its authority from the State of Rhode Island. 19 F.3d at 696-97. It is precisely and only because RIILCSA(Narragansett) applied Rhode Island's gaming laws and regulations to Narragansett Indian lands that the First Circuit found RIILCSA(Narragansett) to be repugnant to IGRA. 19 F.3d at 704-705. Both statutes have the same effect of applying state gaming laws, with or without the parenthetical language.

Third, the District Court's error is buttressed by basic grammar rules regarding the use of parentheticals:

> Brackets (parentheses) are punctuation marks used within a sentence to include information that is not essential to the main point. Information within parentheses is usually supplementary; were it removed, the meaning of the sentence would remain unchanged.

Scrbendi,https://www.scribendi.com/advice/how_to_use_brackets_properly.en.html. *See also Chickasaw Nation v. United States*, 534 U.S. 84, 85 122 S. Ct. 528, 530 (2001) ("The use of parentheses emphasizes the fact that that which is within is

meant simply to be illustrative"); *The Macmillan Handbook of English* (4th ed., 1960) at p.312, ("Parentheses are used to enclose material that is supplementary, explanatory, or interpretative"); *Webster's New Collegiate Dictionary* (1959 ed.), p. 1151; (Parentheses, or marks of parenthesis, are used to set off a word, phrase, or sentence which is inserted by way of comment, explanation, translation, etc., in a sentence but which is structurally independent of it."). Both MILCSA(Aquinnah) and RIILCSA(Narragansett) as a matter of federal law, applied state gaming laws and regulations to respective Aquinnah and Narragansett Indian lands.

Fourth, the District Court's error is further fortified by it concluding that the presence of the parenthetical language, is "unambiguous" language evidencing Congressional intent that IGRA not apply to Aquinnah (App. Vol. II, 343 at pp. 33-34). The District Court reaches this conclusion based entirely upon the parenthetical language and actually cites to *Passamaquoddy* for the proposition that the Indian Canon of Construction applies only where the statute is ambiguous. That is quite a stretch and shows the error here. The "unambiguous" language at issue in *Passamaquoddy* is the savings clause that clearly states that subsequent federal legislation intended for the benefit of Indians does not apply to the Maine tribes unless Congress expressly provides for its application. Essentially, the District Court has ruled that the parenthetical language in MILCSA(Aquinnah) means exactly the same thing as express and clear provision in MICA(Maine).

Certainly, the two provisions do not have the same meaning. Certainly, the parenthetical language does not unambiguously preclude Congress from applying IGRA to Aquinnah Indian lands. If Congress intended for such a result, Congress would have utilized the clear language it used in MICA(Maine), and would not have simply added the parenthetical language in MILCSA(Aquinnah). *Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."); *See also Meghrig v. KFC Western, Inc*., 516 U.S. 479, 485 (1996); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991). Accordingly, the Indian Canons of Construction should be applied. *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

Fifth, the District Court's error is further fortified by the First Circuit's analysis of IGRA's legislative history regarding RIILCSA(Narragansett). Rhode Island directed the Court to language in the Senate Report and to a colloquy on the Senate floor wherein a chief sponsor of IGRA assured the then-Senator from

Rhode Island that RIILCSA(Narragansett)'s gaming restrictions would remain in effect. *Narragansett,* 19 F.3d at 688-90. The First Circuit noted that earlier drafts of IGRA, which would have expressly exempted Indian lands in Rhode Island from IGRA's reach, were deleted from IGRA's final language, and rejected Rhode Island's analysis. In contrast, there is no legislative history suggesting that Indian lands in Massachusetts were to be excepted from IGRA's reach. This point underscores Aquinnah's position, that, twice, Congress could have made clear that IGRA was not to apply to Aquinnah Indian lands. First, in the passage of MILCSA(Aquinnah), Congress could have included a savings clause similar to the one at issue in MICA(Maine). Second, in the passage of IGRA, Congress could have included language that IGRA did not apply to Aquinnah Indian lands. Congress did not do so in either piece of legislation, and the District Court erred by essentially writing such language into both statutes, which of course, it cannot do.

Sixth, the District Court's error is further fortified by the thorough and well-reasoned opinions of the United States Department of the Interior (App. Vol. I, 213) and the NIGC (App. Vol. I, 232), which found that gaming on Aquinnah Indian lands is governed by IGRA and not by MILCSA(Aquinnah). In particular, the Department of the Interior's opinion goes into great detail regarding the very legal issues that are the subject of the instant appeal and concluded that IGRA and

MILCSA(Aquinnah) are repugnant to one another and that IGRA repealed the application of MILCSA(Aquinnah) to the Tribe's gaming activities:

> We will follow the *Narragansett* court's framework to determine whether IGRA applies to the Tribe's Settlement Lands. We begin by asking whether the Tribe possesses sufficient jurisdiction over the Settlement Lands so that IGRA applies. Next, we examine the interface between IGRA and the Settlement Act to determine whether they can be harmonized or whether an implied repeal occurred. For the reasons stated below, we find that IGRA applies and impliedly repealed those portions of the Settlement Act related to gaming.

August 23, 2013 Opinion of the Office of the Solicitor for the Department of the Interior at p. 7 (App. Vol. I, 213)

The District Court asserts that it need not give any deference to these well-reasoned opinions. App. Vol. II, 343 at p.32, n.23. The Court's error in failing to provide *Chevron* and/or *Skidmore* deference to the federal government's formal opinions is discussed in greater detail below. The very fact that the Solicitor of the Department of the Interior and the District Court reached entirely opposite conclusions should at a minimum demonstrate that the District Court wrongfully concluded that the parenthetical language used in MILCSA(Aquinnah) is an unambiguous statement that removes Aquinnah from IGRA's reach.

Seventh, The District Court's error is further fortified by its improper embrace of *dictum* in litigation brought by the Narragansett Tribe against the NIGC after Congress adopted the Chafee Amendment. App. Vol. II, 343 at p.31, n.22. After the First Circuit's decision in *Narragansett,* Congress enacted

legislation expressly stating that IGRA does not apply to the Narragansett Tribe. The District Court seizes on *dictum* where the D.C. Circuit observed that "[t]he Catawba Indians' and the Wampanoag Tribal Council's settlement acts specifically provide for exclusive state control over gambling." *Narragansett v. National Indian Gaming Commission*, 158 F.3d 1335, 1341 (D.C. Cir. 1998). That *dictum* runs contrary to the First Circuit's analysis that subjecting a tribe to state civil and criminal laws does not constitute a divestment of the tribe's jurisdiction. Even if IGRA had never become law, and MILCSA(Aquinnah) clearly governed Aquinnah's gaming activities, the Tribe would still be able to govern gaming on its lands to the extent it was not in contravention with Commonwealth or Town law. The Tribe would be free to require tribal licenses of tribal employees and tribal vendors. The Tribe would be free to impose strict minimum internal controls and procedures and otherwise dictate how business would be conducted, so long as such tribal actions did not contravene state law. MILCSA(Aquinnah) was not at issue in Narragansett's litigation over the Chafee Amendment, and Aquinnah was not a party to the litigation. The District Court's reliance on the *dictum* in Narragansett's litigation over the Chafee Amendment is simply wrong.

Eighth, the District Court's error is further fortified by its faulty speculation as to the timing of the passage of MILCSA(Aquinnah) vis-à-vis IGRA. The District Court reasons that the "virtually concurrent enactment" of

MILCSA(Aquinnah) and IGRA deprives Aquinnah of the implied repeal analysis in *Narragansett*. App. Vol. II, 343 at p.36. Congress was deliberating a comprehensive statute to occupy the field and govern gaming activities on Indian lands at the time MILCSA(Aquinnah) was passed. Indeed, Congress had considered several different approaches to a comprehensive scheme to govern Indian gaming beginning in 1983, with the introduction of HR 4566. *See* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where are We Going?*, 26 Creighton L. Rev. 387, 396 (1993) Several bills were introduced and committee hearings were convened each year thereafter through 1988. Yet, no consensus was reached with enough votes for passage until the passage of IGRA. Accordingly, it was prudent for Congress to address the matter in 1987 in the context of MILCSA(Aquinnah) to serve as a placeholder to govern Aquinnah's gaming activities while Congress was deliberating comprehensive legislation. The District Court's conjecture that Congress must have intended the language in MILCSA(Aquinnah) to control over IGRA because the two statutes were enacted one year and two months apart has no basis in the language or in the legislative history of either Act. The true context is that Congress was aware at the time of enacting MILCSA(Aquinnah) that it would likely pass legislation establishing a comprehensive scheme for the regulation of Indian gaming, but Congress was not aware of what the comprehensive scheme ultimately would be. The Solicitor's

Opinion regarding the NIGC's approval of the Class II Gaming Ordinance for the Isleta del Sur Pueblo (Tigua) came to a similar conclusion:

> The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by the enactment of the IGRA, scarcely one year after the Restoration Act.

(Add. 104 at p.21).

The cases cited by the District Court can all be distinguished by their respective specific facts and circumstances. The Supreme Court in *Traymor v. Turnage,* 485 U.S. 535 (1988) did note that the two statutes at issue were adopted in the same year, but based its decision on the standard criteria to determine that there was not an implied repeal between the anti-discriminatory provisions of the Rehabilitation Act and the statutory limitations to review decisions of the Veterans Administration. *Id.* at 547. The *Traymor* Court did not conclude that its decision would have been different if the statutes had been passed in separate sessions of Congress. The District Court also cites an old case from the Second Circuit, *Pullen v. Morgenthau*, 73 F.2d 281 (2nd Cir. 1934), which does state that the presumption against implied repeal is stronger when the subject statutes are passed by the same Congress. *Id.* at 283. The admiralty statutes at issue, however, were passed within nine days of each other and the opinion fails to inform how

the timing would undo an otherwise proper analysis of implied repeal. The District Court also cites a dissenting opinion where then-Justice Rehnquist criticized the Court majority for having found an implied repeal where the statutes at issue were passed by the same Congress. *Washington County v. Gunther,* 452 U.S. 161, 188, 193 (1981). The majority of the *Gunther* Court was not persuaded by the argument.

Ninth, the District Court's error is further fortified by its faulty application of the Canon of Construction that where two statutes conflict, the more specific statute controls. Nov. 13, 2105 Order at p.36. MILCSA(Aquinnah)'s purpose is to resolve long-standing disputes of aboriginal title, while IGRA only and specifically sets forth the tribal/state relationship regarding gaming. This Appeals Court rejected Rhode Island's use of the same argument. 19 F.3d at 704 n.21. See also (App. Vol. I, 213 at p.17). The District Court again attempts to distinguish *Narragansett* based on the parenthetical language in MILCSA(Aquinnah), but as this Court held in that decision, IGRA still remains as the more specific statute providing extensive detail as to the place, manner, scope and regulation of gaming on Indian lands, imposing an exclusive tribal/NIGC regulatory scheme for the Class II gaming at issue here.

Tenth, the District Court's error is further fortified by its improper use of the legislative history of a different, earlier piece of legislation (App. Vol. II, 343 at

pp.37-38). The District Court references the April 9, 1986 Senate Committee testimony of a former tribal leader and her understanding that the draft legislation would forever prohibit gaming on Indian lands. That testimony provides no insight whatsoever as to Congress' intent, and contradicts the reality of the circumstances. The legislation that was under consideration in 1986 included an absolute prohibition of the Tribe exercising any jurisdiction over the lands to be transferred to the Tribe. H.R. 2868, 99th Cong. § 107(a) (1986). *See also* H. Rep. No. 99-918, at 5(1986). The Wampanoag Tribe of Gay Head (Aquinnah) at the time, had not received federal recognition and the outcome of its pending administrative application for such recognition was unknown. The testimony runs contrary to the express language in MILCSA(Aquinnah) that applies state gaming laws rather than creating an outright prohibition. Further, the testimony was given prior to the Supreme Court's affirmation of Indian tribes' right to offer gaming on their Indian lands over the objection of the states in the 1987 landmark case, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The District Court's reliance on the testimony is improper.

C. Aquinnah Exercises Sufficient Governmental Power over its Indian Lands for Aquinnah Indian Lands to Qualify for Gaming Under IGRA: The District Court Erred in Concluding That the Tribe's Struggling Efforts to Establish and Expand its Governmental Presence are Deficient.

1. Aquinnah Exercises Sufficient Governmental Power over its Indian Lands For the Lands to Qualify for Gaming Under IGRA.

The provisions of IGRA related to Class I and Class II gaming mandate that a tribe must have jurisdiction over the land and IGRA's provision defining the elements of "Indian lands" mandates that a tribe must exercise "governmental power" over the land. 25 U.S.C. §§ 2703(4), 2710(b)(1) and 2710(d)(3)(A). *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity. must have jurisdiction over that land."); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217-18 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

All parties in this litigation stipulated that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement Lands pursuant

to the provisions of the Federal Act" (App. Vol. I, 182 at ¶ 22). As discussed below, that stipulated fact is alone sufficient to meet the *Narragansett* two-step analysis.

The Tribe's actual exercise of its jurisdiction over the Settlement Lands, however, far exceeds the threshold requirements. The Tribe regularly asserts its jurisdiction over its Settlement Lands. The tribal government is responsible for stewarding the Settlement Lands, including providing a full range of services to the Tribe's members, including education, health and recreation, public safety and law enforcement, public utilities, natural resources management, economic development, and community assistance. Furthermore, the Tribe polices the Settlement Lands and applies tribal laws to its members on the Settlement Lands. The record below [7] provides examples of several ordinances enacted and

[7] The exercise of the Tribe's jurisdiction is manifested by the Tribe's enactment and implementation of a range of tribal laws, *see* May 28, 2015 Declaration of Chairman Tobias J. Vanderhoop at App. Vol._I, 308 ¶¶ 4-14 and exhibits (Docs. 119-2 thru 119-18), including but not limited to: (1) Tribal Ordinance regarding building, health, fire and safety; (2) Tribal Ordinance regarding the establishment of an Historic Preservation Office; (3) Tribal Ordinance regarding fish, wildlife and natural resources; (4) Tribal Ordinance regarding housing; (5) Tribal Ordinance regarding lead paint; (6) Tribal Ordinance regarding enrollment; (7) Tribal Ordinance regarding elections: (8) Tribal Ordinance regarding the judiciary; (9) Tribal Ordinance regarding criminal background checks; (10) Tribal Ordinance regarding notice and reporting of child abuse and neglect; (11) Tribal Environmental Agreement between the Tribe and the United States Environmental Protection Agency; (12) Agreement between the National Park Service, U.S. Department of the Interior and the Tribe for the assumption by the Tribe of certain

implemented by the Tribe, including ordinances dealing with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, enrollment, elections, judiciary, criminal background checks, and reporting of child abuse and neglect. The record also provides examples of several intergovernmental agreements between the Tribe and the U.S. Environmental Protection Agency, the National Park Service, the Bureau of Indian Affairs, the Commonwealth and the Town. The Tribe's exercise of its jurisdiction over its Settlement lands is robust and extensive, far in excess of the minimal threshold required to satisfy the *Narragansett* Court's analysis.

Federal courts consistently recognize that Indian tribes retain attributes of sovereignty over both their members and their territories. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). Jurisdiction is an integral part of a tribe's retained sovereignty. *Narragansett*, 19 F.3d at 701. It is well-settled that tribes possess aspects of sovereignty not

---

responsibilities pursuant to the National Historic Preservation Act; (13) Fire Cooperative Agreement, No. CTS50T03041, between the Tribe and the Eastern Region Bureau of Indian Affairs; (14) an Intergovernmental Agreement between the Tribe and the Commonwealth, regarding Indian child welfare matters; (15) an Intergovernmental Agreement on Cooperative Land Use and Planning between the Tribe and the Town; and (16) Operational Plan, pursuant to an Agreement between the Tribe and the Town.

withdrawn by treaty or statute or by implication as a necessary result of their dependent status. *Wheeler*, 435 U.S. at 323; *Narragansett*, 19 F.3d at 701. Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed. *Bryan v. Itasca County*, 426 U.S. 373, 392 (l976). The First Circuit in *Narragansett* found that the tribe's retained jurisdiction, even if concurrent with the jurisdiction of the State of Rhode Island, was "substantial enough" for the tribe's lands to qualify for gaming under IGRA. 19 F. 3d at 701.

To defeat IGRA's low threshold for the Tribe's exercise of jurisdiction over its Indian lands, the Commonwealth must first prove that the MILCSA(Aquinnah) completely divested the Tribe of jurisdiction over the Settlement Lands. Congress knew well how to employ language to achieve such a result. *See e.g.,* California Rancheria Termination Act of 1958, Public Law 85-671, August 18, 1958, [H.R. 2824] 72 Stat. 619 at § 10(b) ("After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians *because of their status as Indians shall be inapplicable to them*, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction.")(emphasis added); Western Oregon

Indian Termination Act, Public Law 588. Chapter 733, August 13, 1954, [S. 2746] 68 Stat. 724 at § 13(a) ("the Secretary shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to the affairs of the tribe and its members has terminated. Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians, excluding statutes that specifically refer to the tribe and its members, shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.")

Each and all of the Appellees have stipulated that the Tribe possesses and "*exercises*" the requisite jurisdiction (App. Vol. I, 182 at ¶22). The MILCSA(Aquinnah)'s grant of jurisdiction to the Commonwealth provides:

> Except as otherwise expressly provided in this Act or the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

25 U.S.C. § 1771g. Nothing in the statute's language suggests that the Commonwealth's jurisdiction was intended to be complete to the exclusion of the

Tribe. See *Narragansett*, 19 F.3d at 701; *United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (Congress knew how to include language to provide for exclusive jurisdiction and the omission of such language evidences its intent that state jurisdiction not be to the exclusion of tribal jurisdiction). MILCSA(Aquinnah) explicitly limits the exercise of the Tribe's jurisdiction over the Settlement Lands, but in doing so, it acknowledges rather than completely divests the Tribe's jurisdiction:

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this Act, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

25 U.S.C. § 1771e(a). The Tribe's jurisdiction over the land is apparent when compared with the language divesting the Tribe of jurisdiction over nontribal members. The statute states that the Tribe "shall not have any jurisdiction" over nontribal members, but preserves the Tribe's jurisdiction over the land by stating that any jurisdiction exercised must not contravene Commonwealth or federal law.

Importantly, H.R. 2868, an older (1986) version of the legislation that eventually culminated in the MILCSA(Aquinnah), would have barred the Tribe from exercising any form of jurisdiction over the land, but Congress ultimately changed the text before it became law:

> No Indian tribe or band may exercise any form of jurisdiction (whether or not such tribe or band is a federally recognized Indian Tribe or band) over any part of the settlement lands, or any other land that may now or in the future be owned by or held in trust for such Indian entity in the town of Gay Head, Massachusetts, except to the extent provided in this Act, the State Implementing Act, or the Settlement Agreement.

H.R. 2868, 99th Cong. § 107(a) (1986). *See also* H. Rep. No. 99-918, at 5(1986) (explaining the Bill "provide[d] that no Indian tribe may exercise any form of jurisdiction over the settlement lands or any other lands owned by such Indian entity within the town of Gay Head except to the extent provided in this Act, the State Implementing Act or the Settlement Agreement"). Based on this discarded and more stringent language, it is clear that Congress contemplated divesting the Tribe of jurisdiction but ultimately chose not to do so. Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended. *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Narragansett* 19 F.3d at 700. The House Report on MILCSA(Aquinnah) further supports the Tribe:

> [W]hile the civil and criminal laws of Massachusetts will be applicable on the settlement lands, the [T]ribe will be able to assume concurrent jurisdiction over its own members with the State and the [T]own as long as such jurisdiction is consistent with the civil and criminal laws of the State and the Town."

H. R. Rep. No. 100-238, at 6 (1987). In their legal opinions issued in the fall of 2013, the Department of the Interior and the NIGC opined that Aquinnah exercises sufficient governmental power for the lands to qualify under IGRA.

2. The District Court Erred in Concluding That the Tribe's Struggling Efforts to Establish and Expand its Governmental Presence are Deficient.

The District Court ruled that Aquinnah does have jurisdiction over its Indian lands concurrent with the Commonwealth, but found that the Tribe does not exercise sufficient governmental power for the lands to qualify for gaming under IGRA. In analysis that is frankly bewildering to the Tribe, the District Court engages in an extensive critique of the Tribe's genuine efforts to exercise its governmental power and its many manifestations of governmental services. The District Court correctly cites to this First Circuit's decision in *Narragansett* as to the concrete manifested examples of Narragansett governmental power:

> In the post-recognition period, the Tribe has taken many strides in the direction of self-government. It has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Urban Development, see 24 C.F.R., Part 905 (1993). It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," 33 U.S.C. § 1377(e) (1988), and as being capable of administering an effective program of water regulation, see 40 C.F.R. § 130.6(d) (1993). It has taken considerable advantage of the Indian Self–Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." 25 U.S.C. § 450a(b) (1988). The Tribe administers

> health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. These activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.

19 F.3d at 703. The District Court complained that the case law provided little guidance on the issue, while neglecting to even recognize the rich history on the issue that has been developed by the NIGC in the context of approvals of gaming ordinances and the issuance of formal determinations of whether lands qualify for gaming. Despite the NIGC being the agency delegated by Congress to make the determinations regarding governmental power, the District Court proceeds to fiat out of thin air holding that the Tribe must demonstrate that it has the means "itself" to provide the requisite governmental services to the gaming facility. App. Vol. II, 343 at pp.24-25. The District Court proceeds to find the lack of sufficient governmental power because (1) the fledgling tribal police department cannot enforce state law without cross-deputization by a non-tribal authority; (2) the Town of Aquinnah[8], rather than the Tribe, provides most services regarding law

[8] The District Court fails to mention that the Town's Fire Department is a volunteer fire department manned in part by members of the Tribe who are typically the first responders. Nor does the District Court mention that the emergency services on the Island of Martha's Vineyard are an amalgamation of resources from various municipalities, as well as the Tribe, that are made available through a series of inter-governmental agreements.

enforcement and public safety services including police, fire and emergency services; and (3) those programs the Tribe does have that are manifestations of governmental power are inadequate. We take each of these in turn.

First, no tribal police department for any tribe anywhere in the United States has inherent jurisdiction to enforce state law (or derivatively municipal law). See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011, 1023 (1978) (principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians). Although Congress has since enacted legislation that allows for tribal enforcement and criminal jurisdiction in limited circumstances for violations of federal law, such legislation does not extend to authorize tribes to enforce state law. Many tribes, including many tribes offering gaming on their lands, do not have police departments at all. 25 U.S.C. § 1301(2) (known as the "Duro Amendment" authorizes tribal criminal jurisdiction over non-member Indians); Violence Against Women Reauthorization Act of 2013, 42 U.S.C. §§ 13701 et seq, (allowing for tribal prosecution of non-Indians for domestic violence in tribal court). Many more, however, address the issue by entering into cross-deputization agreements with state and non-Indian local law enforcement. *See American Indian Law Deskbook at § 14.10 Law Enforcement Activities* (2016); *Fresh Pursuit From Indian Country: Tribal Authority to Pursue Suspects Onto State Land*, 29 Harv. L. Rev. 1685, 1694-95 (April 8, 2016). The

execution of these intergovernmental agreements is itself an exercise of tribal governmental power. Under the District Court's standard, however, many tribes with gaming facilities around the country are operating illegally.

Second, many if not most of the tribal gaming operations around the country involve tribes that do not themselves provide basic law enforcement, fire and EMS services. Rather, they enter into inter-governmental agreements or memoranda of understanding with county and local government to provide those services. See *Intergovernmental Compacts In Native American Law: Models For Expanded Usage,* 112 Harv. L. Rev. 922, 927-28 (1999); Walking on Common Ground: Tribal-State Collaborations, Law Enforcement and Cooperative Agreements, walkingoncommonground.org (includes extensive list with links to agreements). Again, the acts of entering into such agreements to ensure that governmental responsibilities are fulfilled are themselves exercises of tribal governmental power. To impose a standard that the tribe itself must provide such services would cripple or close many tribal gaming facilities around the country. While it is true that many tribes now have sophisticated police, fire and EMS protection as mature branches of tribal government, none of them started out that way, and many of them rely heavily on revenue from tribal gaming facilities to allow them to fund and grow such programs to maturity.

Third, the District Court's criticism of the Tribe's programs suggests an even more difficult standard. Although a stated purpose of IGRA is to promote strong tribal government, the District Court is suggesting that only the strongest of tribal governments can qualify for gaming under IGRA. In a blistering criticism of the Tribe, the District Court writes:

> The Tribe has no health board or health inspector. And while the Tribe contends that it is responsible for providing health services on the Settlement Lands, its health clinic is staffed by only one part-time nurse and a doctor who visits only a few times a year. The Tribe does not have a public school. Nor does the Tribe provide any public housing beyond that which is funded by the U.S. Department of Housing and Urban Development. There is no tribal criminal code, prosecutor, or jail. The Tribe's judiciary, which was organized two years ago, offers only a limited judicial function. Its cases are heard by a judge who is hired on a case-by-case basis and who presides by teleconference from Washington State over proceedings that are conducted in a building off the Settlement Lands. And, importantly, the Tribe has no tax system in place on the lands to fund any future governmental services.

App. Vol. II, 343 at p.27. Through this blistering criticism, however, the District Court concedes that the Tribe does maintain a health clinic, does provide public housing, and does have a tribal court. Through this blistering criticism, the District Court strongly suggests that it would reach a different result if the Tribe implemented a tax system. Of course, the decision not to implement a tax system where the trust land is not taxable and a tax would impose an undue burden on tribal members seeking to establish businesses is, in and of itself, an exercise of governmental power. The District Court fails to acknowledge the Tribe's extensive

involvement in the self-governance programs of the United States wherein the Tribe compacts with the federal government to implement and operate governmental programs that had previously been operated by the Bureau of Indian Affairs or Indian Health Services. Indeed, Aquinnah was the first tribe on the east coast to obtain self-governance status and begin operating directly programs that previously been operated by federal agencies. The District Court fails to acknowledge the multiple "Treatment in the Same Manner as State" agreements with the United States Environmental Protection Agency – the same programs identified by the *Narragansett* Court as sufficient manifestations of governmental power. 19 F.3d at 703. The District Court criticized Aquinnah for only having federal funds for its public housing program even though the *Narragansett* Court expressly identified the tribe's use of federal self-governance funds to run tribal programs as a sufficient manifestation of governmental power. *Id.* The District Court sets a standard that Aquinnah and many tribes now gaming under IGRA cannot meet.

The irony is not lost on Aquinnah that while it has struggled (but succeeded) to accomplish much in the maturation and expansion of critical governmental programs on extremely limited funds and resources such maturation and expansion of critical governmental programs could be much more easily accomplished with Aquinnah governmental revenue generated from a tribal gaming facility. Yet, the

District Court looks to unfulfilled needs of the Tribe as the basis for its conclusion that the Tribe is not eligible for gaming under IGRA.

3. The District Court Erred in Disregarding the NIGC's Determination as to the Sufficiency of the Tribe's Exercise of Governmental Power.

In the context of the District Court acknowledging the paucity of case law on the sufficiency of the manifestation of governmental power, it is important to note that the District Court fails to even mention that agency legal opinions are a necessary part of the NIGC's final agency action; the NIGC will not approve a site-specific gaming ordinance without making the determination that the Indian lands qualify and that the Tribe exercises sufficient governmental authority over the lands. The NIGC engages in that analysis in every site-specific gaming ordinance it reviews and every Indian Lands Determination it makes. See nigc.gov/reading room/ gaming ordinances. *See Miami Tribe of Oklahoma v. United States*, 198 Fed. Appx. 686, 2006 WL 2392194 at *4 (10th Cir. 2006) (describing inter-agency process between DOI and NIGC for Indian lands opinion in the context of NIGC taking final agency action).

The District Court concludes that it can disregard the opinions of the Department of the Interior and the NIGC regarding the issues in this appeal because the opinions do not themselves constitute final agency action, and because there is not agency expertise required to do the statutory analysis regarding an implied repeal. App. Vol. II, 343 at p.31, n.22. The determination of whether a

tribe has the requisite manifestation of governmental power is a circumstance where there *is* special expertise. Further, the approval of the gaming ordinance is a final agency action, and the legal determination by the Solicitor's Office is a necessary part of that decision. Indeed, negative opinions result in the NIGC's disapproval of the gaming ordinance. Even if the District Court need not give deference to the issues of implied repeal, deference should be given to the fact-based issue of exercising governmental power.

This Appeals Court should apply the framework established in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Under such a framework, a court first asks whether Congress has directly spoken to the precise question at issue, in which case the court must give effect to the unambiguously expressed intent of Congress. *Deppenbrook v. Pension Benefit Guar. Corp*, 778 F.3d 166, 172 (D.C. Cir. 2015) (citation omitted). If the statute is silent or ambiguous with respect to the specific issue, however, the court moves to the second step, and defers to the agency's interpretation as long as it is based on a permissible construction of the statute. *Id.* To trigger deference, Congress must have delegated authority to the agency to make rules carrying the force of law, and the agency interpretations for which deference is claimed must have been promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1136 (D.C.

Cir. 2014). As such, "the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue." *Barnhart v. Walton*, 535 U.S. 212, 222, 122 S. Ct. 1265, 1272 (2002).

The federal government's decisions as to the sufficiency of the Tribe's exercise of governmental authority fall within the scope of *Chevron*[9]. They were prepared as part of the NIGC's Final Agency Action allowing the Tribe's Gaming Ordinance to go into effect. Congress delegated to the NIGC the responsibility to interpret and implement IGRA. 25 U.S.C. § 2706(b)(10). Congress delegated to the Department of the Interior the responsibility to interpret and implement MILCSA(Aquinnah). 25 U.S.C. §§2 and 9. The two agencies with the requisite authority for interpretation and implementation of the two federal statutes at issue cooperated and appropriately applied the expertise of both agencies. Applying

[9] The Tribe believes that deference should also be given to the federal government's position regarding implied repeals, but concedes that issue involves different agency expertise. As the agency responsible for addressing the interface of statutes intended for the benefit of Indians and the exercise of the government's trust responsibility regarding the implementation and enforcement of those statutes, and in its adherence to 25 U.S.C. § 9, the Department of the Interior has indeed developed an expertise and deference should be afforded its decision.

Chevron, because the Department of the Interior's and the NIGC's collective interpretation is reasonable, such interpretation should not be overturned.

Even if this Court does not give the federal government's position *Chevron* deference, it should still afford *Skidmore* deference. *Skidmore v. Swift Co.*, 323 U.S.134, 139, 65 S. Ct. 161, 164 (1944). The Supreme Court has reasoned that even if the agency interpretation is part of a formal interpretive agency action, if that interpretation is "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case," the Court should give it "considerable and in some cases, decisive weight." *Skidmore*, 323 U.S. at 139. The First Circuit has recently reasoned that the degree of *Skidmore* deference is based on a mix of factors, including the thoroughness evident in the agency's consideration, the validity of its reasoning, and the consistency of its interpretation with earlier and later pronouncements. *Merrimon v. Unum Life Ins. Co. of America*, 758 F.3d 46, 54-55 (1st Cir. 2014). All of those factors weigh heavily in favor of substantial deference here. Two agencies were cooperative and thorough, providing very detailed research and sourced reasoning that is consistent with similar pronouncements. Further, the opinions were issued in the context of necessary analysis for a final agency action. If *Chevron* deference is not warranted here,

substantial *Skidmore* deference is warranted, and this Court should uphold the agency interpretations.

A separate but related error is found in the District Court's granting of summary judgment against the Tribe. If the District Court's interpretation of the law is correct, the appropriate ruling on cross-motions for summary judgment would be to deny the cross-motions and allow the factual question of the extent/adequacy of the Tribe's exercise of governmental power to proceed to discovery and trial. In the context of deliberation of the Appellees' cross-motions for summary judgment, the District Court must view "the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009). When "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed.R.Civ.P. 56(e)). The Tribe's extensive showing of governmental power should establish that IGRA's threshold has been reached, but if not, the Tribe's extensive showing informs the Court that at worst, it is a disputed issue of material fact such that the District Court erred in granting summary judgment against the Tribe.

D. The United States Continues to Assert Jurisdiction Over Gaming Activities on Aquinnah Indian Lands to the Exclusion of the Commonwealth: The District Court Erred in Concluding that the Commonwealth's Lawsuit Could Proceed Without the National Indian Gaming Commission as a Party.

The United States continues to assert jurisdiction, to the exclusion of the Commonwealth, over gaming activities on Aquinnah Indian lands. The position set forth in the two opinions of the Department of the Interior and the NIGC has not changed. The NIGC's approval of Aquinnah's site-specific Class II Gaming Ordinance remains in effect. The recent developments of the approval of Class II Gaming Ordinances for the Isleta del Sur Pueblo (Tigua) and the Alabama Coushatta Tribe of Texas (discussed in further detail below) demonstrate that the federal government's position will likely not be changed even by an adverse decision of this Appeals Court. The District Court twice denied the Tribe's efforts to have the NIGC included as a party-defendant to the Appellees' claims. First, on February 7, 2015, the District Court denied the Tribe's Motion, based on Fed.R. Civ.P. 19 that the action be dismissed with leave to amend with a claim under the Administrative Procedures Act to challenge the NIGC's approval of Aquinnah's site-specific, Class II Gaming Ordinance. The District Court denied that motion in large part because it concluded:

> Pursuant to Rule 19(a)(1)(B)(ii), an absent party is a "required" party if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may . . . leave an existing party subject to a substantial risk of incurring

> double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). The Tribe contends that a decision in plaintiffs' favor in the absence of the United States would yield such a result. Such a decision would subject the Tribe to regulation under Massachusetts state law, but it would not bind the NIGC; consequently, the Tribe would remain subject to federal law as well. According to the Tribe, it would be placed in an "untenable" "Catch-22" in which "[p]roceeding under State law would require that the Tribe violate State law. It is unclear how the Tribe would be "required" to violate either state or federal law by a ruling in favor of the Commonwealth. Applying for a state gaming license would not necessarily violate federal law; in our federal system, parties must often comply with the regulations of multiple sovereigns in order to engage in certain activities. **While it is conceivable that the Tribe's obligations under federal and state law could conflict, the Tribe has not shown that there is a real possibility, much less a "substantial risk," that that would occur.**

February 27, 2015 Order at pp.23-24 (emphasis added). In the first week of October, 2015 developments occurred wherein the NIGC approved Class II Gaming Ordinances for the Isleta del Sur Pueblo (Tigua) and the Alabama Coushatta Tribe of Texas (collectively referred to herein as the "Texas Tribes", and the approvals by the NIGC relative to the Texas Tribes being collectively referred to herein as the "Texas Developments")[10]. Through the Texas Developments, the

[10] Letter dated October 5, 2015 from Jonodev O. Chaudhuri, Chairman of the NIGC to Governor Hisa, Ysleta del Sur Pueblo, with Attachment A (Add. 78), and opinion letter dated September 10, 2015, from Venus McGhee Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Michael Hoenig, General Counsel, NIGC (Add. 78); and
Letter dated October 8, 2015 from Jonodev O. Chaudhuri, Chairman of the NIGC to Nita Battise, Chairperson, Alabama-Coushatta Tribe of Texas, with Attachment A (Add. 104), and opinion letter dated September 10, 2015, from Venus McGhee

federal government has sent a clear message that it intends for the NIGC to exclusively regulate Class II gaming, as defined under IGRA, on the Indian lands of the Texas Tribes to the exclusion of the State of Texas. The Texas Developments demonstrates a "substantial risk" that the "Tribe's obligations under federal and state law could conflict."

The parallels between the Texas Developments and the instant case are significant and material. Aquinnah and the Texas Tribes have all grappled with language, contained in federal statutes passed in 1987 (collectively referred to herein as the "Pre-IGRA Statutes"), which the Commonwealth of Massachusetts and the State of Texas, respectively, maintain exclude Aquinnah and the Texas Tribes from conducting gaming under IGRA. Congress enacted IGRA in 1988, less than a year after passage of each of the Pre-IGRA statutes. The Commonwealth does not object to one Indian tribe, the Wampanoag Mashpee, conducting gaming within the exterior boundaries of the Commonwealth, while simultaneously and vigorously opposing Aquinnah conducting gaming within its exterior state boundaries, just as the State of Texas does not object to one Indian tribe, the Traditional Kickapoo, conducting gaming within the exterior boundaries of Texas, while simultaneously and vigorously opposing the Texas Tribes conducting

---

Prince, Deputy Solicitor for Indian Affairs, Office of the Solicitor, United States Department of the Interior, to Michael Hoenig, General Counsel, NIGC (Add. 78).

gaming within its exterior state boundaries. Just as the Commonwealth has massively expanded non-Indian gaming since the passage of MILCSA(Aquinnah), Texas has massively expanded non-Indian gaming since the passage of the Restoration Act[11]. Just as the Commonwealth is litigating the question of whether MILCSA(Aquinnah) precludes Aquinnah from conducting gaming under IGRA, without including the federal government in the litigation, the State of Texas has litigated the question of whether the Restoration Act precludes the Texas Tribes from conducting gaming under IGRA, without including the federal government in the litigation. Just as the Commonwealth has currently prevailed in its litigation with Aquinnah, pending this appeal, Texas has prevailed in its litigation with the Texas Tribes. *See Texas v. Ysleta del Sur Pueblo*, 36 F.3d 1325 (5th Cir. 1994); *Alabama-Coushatta Tribes of Texas v. Texas*, 208 F. Supp. 2d 670 (E.D. Tex. 2002), *aff'd*, 66 Fed. Appx. 525, 2003 WL 21017542 (5th Cir. 2003). Just as the NIGC approved the Class II Gaming Ordinance for Aquinnah based upon a formal opinion of the Solicitor for the Department of the Interior (the "DOI"), the NIGC has approved Class II gaming ordinances for the Texas Tribes based upon a formal opinion of the Solicitor for the Department of the Interior.

[11] Texas del Sur Pueblo and Alabama and Coushatta Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (codified at 25 U.S.C. §§ 1300g et seq. and 25 U.S.C. §§ 731 et seq.).

In its legal review in the context of the federal action approving the Texas Tribes' Class II gaming ordinances, the Solicitor acknowledged and expressly rejected the *Ysleta* decision:

> [W]e recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands. **However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.**

Add. 104 at p.9 (emphasis added). Significantly, the Solicitor's Opinion re Texas Developments includes a footnote that sets out Supreme Court case law regarding the Department of Interior's prerogative to reject the federal court's interpretation of the statute even where the Department of Interior is a party:

> An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); cf. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). *See also Northern Arapaho Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). **Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.**

Add. 104 at p.9, n.79 (emphasis added). Aquinnah is now in the untenable position where proceeding in a manner consistent with the District Court's decision will subject it to enforcement action by the NIGC. The Solicitor's Opinion re Texas Developments noted that the Texas Tribes are in very same "Catch-22 dilemma" of which Aquinnah complains:

> However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of their provisions. The Restoration Act provides that the violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas." Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a). The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme. Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

Add. 104 at p.19

The District Court below denied the Tribe's Motion without providing any reasoning for its decision, yet by the Court's own analysis in its February 27, 2015 Order, it is clear that this development should have caused the Court to grant the Tribe's Rule 19 Motion. The District Court's error now brings into question of the propriety of moving forward with the instant appeal knowing that the NIGC will likely maintain that it has jurisdiction over Aquinnah Class II gaming activities regardless of the decision of this Appeals Court. The appropriate and prudential

resolution of this appeal is to vacate and remand with instructions to grant the Tribe's Rule 19 Motion. The Texas Developments make clear that the dispute over gaming on Aquinnah Indian lands cannot be resolved without the involvement of the NIGC as a party.

VI. CONCLUSION

For the reasons set forth herein and in the pleadings below, this Appeals Court should vacate the judgement against the Tribe and direct the District Court to grant the Tribe's motion for summary judgment, deny the summary judgment motions of the Commonwealth, the Town of Aquinnah and AGHCA, and enter Final Judgment in favor of the Tribe. Alternatively, the case should be remanded with instructions that partial summary judgement be entered in favor of the Tribe that IGRA, rather than MILCSA(Aquinnah) governs gaming on the Tribe's Indian lands and allow the question of whether the Tribe exercises sufficient governmental power over its Indian lands to proceed to trial. Alternatively, the Appeals Court should vacate the judgement and remand the matter with instructions to dismiss the Complaints against the Tribe with leave to amend to include claims against the NIGC to be brought pursuant to the APA.

Dated: May 28, 2016

Respectfully Submitted,

s/ Scott D. Crowell
SCOTT D. CROWELL
Crowell Law Offices-Tribal
Advocacy Group
1487 W. State Route 89A
Suite 8
Sedona, AZ 86336
425-802-5369
scottcrowell@hotmail.com

LAEL ECHOHAWK
Lael Echo-Hawk
Hobbs Straus Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282
LEcho-Hawk@hobbsstraus.com

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2011 in 14 point Times New Roman.

Respectfully Submitted,

s/ *Scott Crowell*
SCOTT CROWELL
Crowell Law Offices-Tribal Advocacy Group
1487 W. State Route 89A
Suite 8
Sedona, AZ 86336
425-802-5369
scottcrowell@hotmail.com

ATTORNEY FOR THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2016 I electronically filed the foregoing documents with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Counsel for Commonwealth of Massachusetts:

Carrie M. Benedon- carrie.benedon@state.ma.us
Bryan F. Bertram- bryan.bertram@state.ma.us
Juliana deHaan Rice-Juliana.Rice@MassMail.State.MA.US

Counsel for Aquinnah/Gay Head Community Association, Inc.

Felicia H. Ellsworth-Felicia.Ellsworth@wilmerhale.com
James L. Quarles, III-james.quarles@wilmerhale.com
Oramel H. Skinner, III- Oramel.Skinner@wilmerhale.com
Claire Specht- Claire.Specht@wilmerhale.com

Counsel for Aquinnah, MA

Counsel:
Michael A. Goldsmith-mgoldsmith@rrklaw.net
Ronald H. Rappaport- rrappaport@rrklaw.net

s/ Scott D. Crowell
SCOTT D. CROWELL

No. 16-1137

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

COMMONWEALTH OF MASSACHUSETTS; AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC.; TOWN OF AQUINNAH, MA,

Plaintiffs - Appellees

v.

THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH); THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC.; THE AQUINNAH WAMPANOAG GAMING CORPORATION,

Defendants - Appellants

CHARLES D. BAKER, in his official capacity as Governor of the Commonwealth of Massachusetts; MAURA T. HEALEY, in her capacity as Attorney General of the Commonwealth of Massachusetts; STEPHEN P. CROSBY, in his capacity as Chairman of the Massachusetts Gaming Commission,

Third Party - Defendants

On Appeal from the
U.S. District Court for the District of Massachusetts
(CASE NO: 1:13-cv-13286-FDS)

OPENING BRIEF ADDENDUM

Scott Crowell
Crowell Law Offices
Tribal Advocacy Group
1487 W. State Route 89A,
Suite 8
Sedona, AZ 86336
425-802-5369
scottcrowell@hotmail.com

Lael Echo-Hawk
Hobbs Straus Dean & Walker, LLP
2120 L Street NW, Suite 700
Washington, DC 20037
202-822-8282
LEcho-Hawk@hobbsstraus.com

Counsel for Appellants

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLIE BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

MEMORANDUM AND ORDER ON
MOTIONS TO DISMISS

SAYLOR, J.

This lawsuit involves a dispute between the Commonwealth of Massachusetts and a federally recognized Indian tribe concerning regulatory jurisdiction over civil gaming on Indian

lands on Martha's Vineyard. The Wampanoag Tribe of Gay Head (Aquinnah) and related entities have taken steps to commence commercial gaming operations on tribal lands without a license from the Commonwealth. The Commonwealth contends that operating gaming facilities without such a license would violate a 1983 settlement agreement that subjects the lands in question to state civil and criminal jurisdiction (and thus subjects them to state laws regulating gaming). Count 1 of the complaint alleges breach of contract, and Count 2 seeks a declaratory judgment.

The Commonwealth filed suit in state court on December 2, 2013. On December 30, 2013, the Tribe removed the action to this Court on the basis of federal-question and supplemental jurisdiction. *See* 28 U.S.C. §§ 1331, 1367.[1] On August 6, 2014, the Court granted motions to intervene by the Town of Aquinnah and the Aquinnah/Gay Head Community Association ("AGHCA"). The Tribe has moved to dismiss the AGHCA complaint on the basis of sovereign immunity and for failure to state a claim upon which relief can be granted; it has further moved to dismiss all three complaints (with leave to amend) for failure to join the United States as a required party.

On October 24, 2014, the Tribe filed an amended answer that included a counterclaim against the Commonwealth and counterclaims against three third-party defendants (all of whom are officials of the Commonwealth). Plaintiff and third-party defendants have moved to dismiss the counterclaims on the grounds of sovereign immunity (as to the counterclaims against the Commonwealth) and failure to state a claim upon which relief can be granted.

---

[1] According to the Commonwealth, the Aquinnah Wampanoag Gaming Corporation is a wholly-owned subsidiary of the Tribe or the Wampanoag Tribal Council of Gay Head, Inc. According to defendants, the Wampanoag Tribal Council of Gay Head, Inc., no longer exists. (Notice of Removal at 1 n.1). For the sake of simplicity, the Court will refer to defendants collectively as "the Tribe."

For the reasons stated below, the motions of the Tribe will be denied and the motion of counterclaim-defendants will be granted in part and denied in part.

I. Background

A. Factual Background

Unless otherwise noted, the facts are presented as stated in the complaint.

Historically, the western tip of Martha's Vineyard has been home to the Wampanoag Tribe of Gay Head (or Aquinnah). In 1974, the Wampanoag Tribal Council of Gay Head, Inc., sued the Town of Gay Head, asserting aboriginal property rights to certain land within the town.[2] In November 1983, the Commonwealth; the Town of Gay Head; the Taxpayers' Association of Gay Head, Inc.; and the Wampanoag Tribal Council of Gay Head, Inc., entered into a settlement agreement that they termed a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" (the "Settlement Agreement"). The Town and the Taxpayers' Association conveyed to the Wampanoag Tribal Council approximately 400 acres of land (the "Settlement Lands") to be held "in the same manner, and subject to the same laws, as any other Massachusetts corporation." (Compl., Ex. A). The Tribal Council relinquished all claims to other lands and waters in the Commonwealth. The Settlement Agreement provided that "[u]nder no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth of Massachusetts . . . over the settlement lands . . . be impaired or otherwise altered" and "no Indian tribe or band shall ever exercise sovereign jurisdiction" over those lands. (*Id.*). The Bureau of Indian Affairs of the United States Department of the Interior later took the

[2] In 1997, the Town of Gay Head changed its name to Aquinnah.

Settlement Lands into trust.

In 1985, pursuant to the terms of the Joint Memorandum, the Massachusetts Legislature enacted a statute implementing the Settlement Agreement.[3] The Settlement Agreement, however, required the approval of Congress to take effect.

In 1987, before Congress passed the implementing statute, the Department of the Interior officially recognized the Wampanoag Tribe of Gay Head as an Indian tribe. *See* 52 Fed. Reg. 4193 (Feb. 10, 1987).

On August 18, 1987, Congress passed the act implementing the Settlement Agreement. *See* Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act, Pub. L. No. 100-95, *codified at* 25 U.S.C § 1771 *et seq.* ("Wampanoag Settlement Act"). The federal act stated that the Settlement Lands are subject to the laws of the Commonwealth of Massachusetts "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g.

In 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* In part, the IGRA established a regulatory structure for gaming on Indian lands and created the National Indian Gaming Commission ("NIGC").

Between 2011 and 2013, the Tribe passed and adopted tribal resolutions instituting a gaming ordinance pursuant to the IGRA. On May 30, 2013, the Tribe submitted an amendment to its gaming ordinance to the NIGC. On August 23, 2013, the Department of the Interior's Office of the Solicitor sent a letter to the NIGC opining that the Tribe had jurisdiction to operate a gaming facility on the Settlement Lands. On August 29, 2013, the NIGC approved the Tribe's

[3] *See* An Act to Implement the Settlement of the Gay Head Indian Land Claims, Mass. Stat. 1985, c. 277.

gaming ordinance, "to the extent that it is consistent with the provisions of IGRA," by operation of law.[4] On October 25, 2013, the NIGC Office of General Counsel sent a letter to the Tribe expressing the opinion that the Settlement Lands were "eligible for gaming." Soon thereafter, the Tribe announced its intention to open a gaming facility in a community center on those lands.

Massachusetts law prohibits any entity from operating a gaming establishment without a license issued by the Massachusetts Gaming Commission. *See* Mass. Gen. Laws ch. 23K, §§ 2, 9, 25. The Tribe has not obtained such a license nor complied with the Massachusetts prerequisites for doing so.

B. Procedural History

On December 2, 2013, the Commonwealth filed a complaint with the Single Justice of the Supreme Judicial Court for Suffolk County against the Tribe, the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation. The complaint asserted a claim for breach of contract and requested a declaratory judgment that the Settlement Agreement allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands. On December 30, 2013, the Tribe removed the action to this Court on grounds of federal-question and supplemental jurisdiction. On January 29, 2014, the Commonwealth moved to remand the action to state court. The Court denied that motion on July 1, 2014.

On July 10, 2014, both AGHCA and the Town filed motions to intervene. The Court granted those motions on August 6, 2014. On August 27, 2014, the Tribe moved to dismiss the AGHCA complaint on the grounds of sovereign immunity and failure to state a claim upon

[4] A gaming ordinance is automatically approved by NIGC, by operation of law, if it does not act on the ordinance within 90 days. 25 U.S.C. § 2710(e).

which relief can be granted. On that same day, the Tribe separately moved to dismiss all three complaints, with leave to amend, for failure to join the United States, which it contends is a required party under Fed. R. Civ. P. 19.

On October 24, 2014, the Tribe filed an amended answer to the complaint filed by the Commonwealth. The amended answer included counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in their official capacity.[5] (For the sake of simplicity, the Court will refer to those claims collectively as the "counterclaims," and those defendants as "counterclaim-defendants").[6] The counterclaims seek declaratory and injunctive relief concerning the Commonwealth's assertion of jurisdiction over gaming that occurs on the Tribe's trust lands. On November 19, 2014, the Commonwealth and the third-party defendants moved to dismiss the counterclaims.

II. Legal Standard

On a motion to dismiss, the Court "must assume the truth of all well-plead[ed] facts and give plaintiff the benefit of all reasonable inferences therefrom." *Ruiz v. Bally Total Fitness Holding Corp.*, 496 F.3d 1, 5 (1st Cir. 2007) (*citing Rogan v. Menino*, 175 F.3d 75, 77 (1st

[5] The original counterclaims named Governor Deval Patrick, Attorney General Martha Coakley, and Chairman of the Massachusetts Gaming Commission Stephen Crosby as third-party defendants. Patrick and Coakley no longer serve in the capacities listed, having been replaced by Governor Charlie Baker and Attorney General Maura Healey. Accordingly, Governor Baker, Attorney General Healey, and Crosby are the third-party defendants as the case currently stands.

[6] The proper means of bringing third-party defendants into a civil case is through the use of a third-party complaint, not a counterclaim. *See* Fed. R. Civ. P. 14. Because third-party defendants are all officials of the Commonwealth, all parties have treated the Tribe's claims against them as counterclaims under Rule 13 (even though third-party defendants are not plaintiffs in this action). Regardless of whether the claims should technically be considered counterclaims under Rule 13 or part of a third-party complaint under Rule 14, the Court's ruling as to their viability at this stage would be the same.

Cir.1999)). To survive a motion to dismiss, the complaint must state a claim that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). Dismissal is appropriate if the facts as alleged do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (alterations omitted) (internal quotation marks omitted).

III. Analysis

A. The Motion by the Tribe to Dismiss the AGHCA Complaint

The Tribe has moved to dismiss the complaint of intervenor AGHCA on jurisdictional grounds and for failure to state a claim upon which relief can be granted. More specifically, the Tribe contends that it possesses sovereign immunity from suit and that its immunity has not been waived or congressionally abrogated with respect to this action.[7] The Tribe further contends that, if it does not have immunity, the AGHCA complaint must be dismissed on the merits. Each of those contentions is discussed below.

1. Sovereign Immunity

"Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority

[7] While the Tribe has not moved to dismiss the complaints filed by the Commonwealth or the Town, it clarified in its motion to dismiss that it is not yet conceding the issue of immunity with respect to those plaintiffs. (Defs' Mem. at 3).

over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citations omitted). "[A] tribe's waiver must be clear" in order to renounce tribal sovereign immunity. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (internal quotation marks omitted). Similarly, in order to abrogate tribal immunity, "Congress must unequivocally express that purpose." *Id.* (internal quotation marks omitted). The Tribe contends that there has been no waiver or abrogation of its sovereign immunity and that the AGHCA complaint must therefore be dismissed.

AGHCA contends both that the Tribe has waived its immunity and that the doctrine of issue preclusion (or collateral estoppel) prevents it from arguing otherwise. Specifically, AGHCA contends that the Massachusetts Supreme Judicial Court has previously determined that the Tribe waived its sovereign immunity with respect to jurisdiction over its lands. *See Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 443 Mass. 1, 12-13 (2004). According to AGHCA, that prior determination binds this Court.

"[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine of issue preclusion prevents "parties from contesting matters that they have had a full and fair opportunity to litigate," and "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-54.

The federal full-faith-and-credit statute, 28 U.S.C. § 1738, provides in substance that "a judgment rendered in state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered." *In re Sonus Networks, Inc., Shareholder Derivative Litig.*, 499 F.3d 47, 56 (1st Cir. 2007) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also* U.S. Const. Art. IV § 1. Accordingly, the preclusive effect of the prior judgment in *Shellfish Hatchery* is determined according to Massachusetts law.

Under Massachusetts law, issue preclusion applies when:

> (1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication. Additionally the issue decided in the prior adjudication must have been essential to the earlier judgment.

Kobrin v. Bd. of Registration in Med., 444 Mass. 837, 843 (2005). The question is whether, under that standard, *Shellfish Hatchery* precludes further litigation of the waiver issue.

Shellfish Hatchery was an action to enforce town zoning laws on certain Tribe lands (known as the Cook Lands). The SJC held that the Tribe had waived its sovereign immunity with respect to the use of those lands. *Id.* at 2-3. The source of the waiver, according to the court, was the 1983 Settlement Agreement. *Id.* at 13. The court specifically pointed to paragraph three of the Settlement Agreement, in which the Tribe agreed to hold its land "in the same manner, and subject to the same laws, as any other Massachusetts corporation," as "clearly establish[ing] a waiver of sovereign immunity." *Id.* at 12, 13.

The first requirement for issue preclusion is whether the prior decision constitutes a "final judgment on the merits." There is no question that it does. The *Shellfish Hatchery*

decision was issued by the Massachusetts Supreme Judicial Court after it granted an application for direct appellate review of the lower court's ruling. *Id.* at 2; *see Sena v. Commonwealth*, 417 Mass. 250, 260 (1994) ("We have implied that for a decision to be final it must have been subject to appeal or actually reviewed on appeal."). Moreover, the Tribe has not contested the finality of the decision.

The second requirement for issue preclusion is that the party against whom preclusion is being asserted (here, the Tribe) must have been either a party to, or in privity with a party to, the prior adjudication. *Kobrin*, 444 Mass. at 843. Privity exists "(1) where the nonparty substantially controlled the previous litigation; (2) where the nonparty is a successor-in-interest to a prior party; or (3) under the doctrine of virtual representation." *Boston Scientific Corp. v. Schneider (Europe) AG*, 983 F. Supp. 245, 257 (D. Mass. 1997) (citations omitted). The question of privity "essentially reduces itself to an inquiry whether the party against whom preclusion is asserted participated in the prior proceeding, either himself or by a representative." *Bourque v. Cope Southport Assocs., LLC*, 60 Mass. App. Ct. 271, 275 (2004).

Officially, the two defendants in *Shellfish Hatchery* were the Wampanoag Shellfish Hatchery Corporation and the Wampanoag Tribal Council of Gay Head. In its initial answer in that litigation, defendants admitted "that the Hatchery is controlled by the [T]ribe," was "exercising delegated authority from the Tribe," and was "wholly owned and operated by the Wampanoag Tribe of Gay Head (Aquinnah)." (Answer and Counterclaim at 1 ¶ 2, 5 ¶ 2, No. 01-10924) (D. Mass. July 13, 2001) (Woodlock, J.).[8] That same document identified the Tribal Council as "a federally recognized Indian Tribe (now known as Wampanoag Tribe of Gay Head

[8] The *Shellfish Hatchery* litigation began in federal court before it was remanded to state court on jurisdictional grounds. (*See* Memorandum and Order of Sept. 30, 2002, No. 01-10924) (D. Mass.).

(Aquinnah)[)]." (*Id.* at 5 ¶ 1). AGHCA cited those prior admissions in its memorandum in opposition to the motion to dismiss; the Tribe did not contest them in its reply.

On this record, it therefore appears that the Tribe is a successor-in-interest to the Tribal Council and substantially controlled the Shellfish Hatchery Corporation at the time of the *Shellfish Hatchery* litigation.[9] Accordingly, the Tribe is in privity with the parties to the prior suit and would be bound by the prior judgment if the remaining requirements are met.

The third requirement for issue preclusion is that "the issue in the prior adjudication [must have been] identical to the issue in the current adjudication." *Kobrin*, 444 Mass. at 843. The precise holding of *Shellfish Hatchery* was that "the Tribe waived its sovereign immunity as to land use on the Cook Lands," not all the Settlement Lands. The land on which the Tribe intends to conduct gaming activities is not part of the Cook Lands. Nonetheless, AGHCA contends that the *Shellfish Hatchery* court determined the issue with respect to other Tribe lands as well. It notes that the language in the Settlement Agreement that the court cited as effectuating a waiver applies not only to the Cook Lands, but to "any other land [the Tribe] may acquire." (Settlement Agreement at ¶ 3). Indeed, the court expressed its finding of a waiver in broader terms than the holding would imply: "[T]he tribe expressly memorialized a waiver of its sovereign immunity, with respect to municipal zoning enforcement, by agreeing, in paragraph three of the settlement agreement, to hold its land, including the Cook Lands, 'in the same manner, and subject to the same laws, as any other Massachusetts corporation.'" *Shellfish Hatchery*, 443 Mass. at 13 (quoting the Settlement Agreement). Reading the court's opinion as a

[9] As noted, the Aquinnah Wampanoag Gaming Corporation is apparently a wholly-owned subsidiary of the Wampanoag Tribe. The Wampanoag Tribal Council apparently no longer exists; if it does, it has been a party to both this litigation and the *Shellfish Hatchery* litigation.

whole, it is clear that the court found a waiver of immunity with respect to the use of not just the Cook Lands, but all of the Tribe's land. It is therefore fair to say that this issue is identical to that currently before the Court.[10]

The final requirement for issue preclusion is that "the issue decided in the prior adjudication must have been essential to the earlier judgment." *Kobrin*, 444 Mass. at 843. The issue need not be "strictly essential," but it must have been "treated as essential to the prior case by the court and the party to be bound. Stated another way, it is necessary that [the court's] finding[] be the product of full litigation and careful decision." *Comm. of Dep't of Employment & Training v. Dugan*, 428 Mass. 138, 144 (1998) (quoting *Home Owners Fed. Savings & Loan Ass'n v. Northwestern Fire & Marine Ins. Co.*, 354 Mass. 448, 455 (1968) (emphasis in original)).

Although the *Shellfish Hatchery* court clearly found that the Tribe had waived its immunity with respect to all of its lands, arguably the only finding that was "strictly essential" to its judgment was that of a waiver with respect to the Cook Lands. Its finding that the Tribe had waived its immunity with respect to other lands was perhaps not essential in a strict sense; if the court had held that the Tribe had waived its immunity with respect to only the Cook Lands, it still would have allowed the zoning enforcement action against the Cook Lands to go forward.

The applicability of issue preclusion thus appears to turn on whether the *Shellfish Hatchery* court "treated as essential" its determination that the Tribe had waived its sovereign immunity with respect to all of its lands—that is, whether that determination was "the product of

[10] If this Court were to rule to the contrary—that the Tribe did not waive its sovereign immunity as to all of its lands—it would necessarily be ruling that the Tribe did not waive its sovereign immunity as to the Cook Lands, which would contradict the ruling of the SJC.

full litigation and careful decision." *See Northwestern Fire & Marine*, 354 Mass. at 455.

The finding of the SJC appears to have been the product of a "careful decision." The SJC did not begin by analyzing whether there was a waiver specifically as to the Cook Lands and then note in passing that the analysis would apply equally to other lands; instead, it first analyzed the Settlement Agreement and found a broad waiver, and then applied that finding to the specific subset of land at issue. The statement that the Tribe waived its sovereign immunity as to all of its lands represents the court's central conclusion (although not strictly its ultimate holding). *Shellfish Hatchery*, 443 Mass. at 13 ("More specifically, the Tribe expressly memorialized a waiver of its sovereign immunity . . . by agreeing . . . to hold its land, including the Cook Lands, 'in the same manner, and subject to the same laws, as any other Massachusetts corporation.'"). That finding was also the product of "full litigation"—that is, the Tribe had a "full and fair opportunity to litigate the issue[]." *See Alba v. Raytheon Co.*, 441 Mass. 836, 844 (2004).[11] The finding of the SJC was thus "essential" to the prior case, and treated as such by the court and the parties.

Thus, the requirements for issue preclusion have been met, and this Court must give full faith and credit to the decision of the Supreme Judicial Court.

The Court further notes that even if the broad finding of the *Shellfish Hatchery* court is for some reason not preclusive, some of its narrower findings undoubtedly are. For example, in order to reach its decision, the SJC necessarily must have determined that the Settlement Agreement was enforceable against the parties and that the Tribal Council was capable of

[11] Arguably, the tribal defendants in *Shellfish Hatchery* had no incentive to distinguish between the Cook Lands and the rest of their lands, because only the Cook Lands were at issue in that litigation. If a determination as to other lands had been "strictly essential" to the judgment, the Tribe conceivably might have advanced arguments more specifically tailored to those lands. It has not, however, identified any such arguments here, and it is certainly doubtful that any such arguments would have convinced the court, in light of its reasoning.

waiving the sovereign immunity of the Tribe even though it had not yet been federally recognized. Those kinds of "subsidiary" findings may give rise to issue preclusion. *See Alba*, 441 Mass. at 844; *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30-31 (1st Cir. 1994) ("An issue may be 'actually' decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation."). This Court is therefore precluded from contravening those findings. Moreover, the *Shellfish Hatchery* court conclusively determined that the Tribe had waived its sovereign immunity with respect to the Cook Lands as a result of the "in the same manner" language in the Settlement Agreement. Thus, this Court is precluded from finding no waiver at all in the Settlement Agreement.

At a minimum, therefore, the preclusive effect of those three subsidiary findings—(1) that the settlement agreement is enforceable, (2) that the Tribal Council had the power to waive the Tribe's sovereign immunity, and (3) that the "in the same manner" language waived the Tribe's immunity with respect to at least the Cook Lands—compels the conclusion that the Tribe's waiver applied to all of its lands. The language in the Settlement Agreement applies equally to the remainder of the Tribe's lands as it does to the Cook Lands; there is no apparent basis on which to distinguish the Cook Lands from the lands targeted for gaming. By that reasoning, therefore, the Tribe waived its sovereign immunity with respect to all of its lands.[12]

The Tribe makes three additional arguments concerning sovereign immunity and issue

[12] The decision of the Massachusetts Appeals Court in *Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285 (2005), cited by the AGHCA, provides additional support. In *Kitras*, the court relied on *Shellfish Hatchery* in finding that the Tribe could properly be joined to a suit aimed at resolving easement claims that could burden some of its lands. *Id.* at 296-98. It specifically stated: "Although *Shellfish Hatchery Corp.* dealt with the Cook Lands and involved a zoning dispute (rather than the easement rights here at issue) we see little reason to suppose the court's rationale would not control the present proceedings." *Id.*

preclusion that merit discussion. First, the Tribe contends that the usual rules of issue preclusion do not apply to sovereign governments in the same way as they do to private parties. It is true that "the Government may not be estopped on the same terms as any other litigant." *Heckler v. Comm'y Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60. However, the rationale for that rule, as it applies to the United States government, is to protect "the public interest in ensuring that the Government can enforce the law free from estoppel." *Id.* at 60-61. There is no obvious reason to apply that principle to avoid the application of issue preclusion to an Indian tribe, which does not enforce laws in service of the general public. Indeed, the Tribe has not put forth a persuasive argument to the contrary.

Second, the Tribe contends that *Shellfish Hatchery* applies only to suits against the Tribe by governmental bodies, and not private parties like the AGHCA. But the AGHCA (and another private party, UMB Bank) had intervened in the *Shellfish Hatchery* litigation, just as it has intervened in this one. The SJC's opinion did not distinguish the claims of those parties in any way. Furthermore, its reasoning applies equally to private parties. The court specifically cited the language in the Settlement Agreement that the Tribe would hold land "in the same manner, and subject to the same laws, as any other Massachusetts corporation" and noted that that status is one "permitting the Tribe to sue or be sued." *Shellfish Hatchery*, 443 Mass. at 13 (quoting the Settlement Agreement); *see* Mass. Gen. Laws ch. 155 § 6 ("A corporation may . . . sue and be sued . . . ."). Massachusetts corporations can be sued by private parties as well as governmental entities; there is therefore no reason to conclude that the holding applies differently as to the claims of private parties than as to the claims of governmental bodies.

Finally, the Tribe relies heavily on an earlier decision of this Court that (it contends) directly contradicts the decision in *Shellfish Hatchery*. *See Wampanoag Tribe of Gay Head*

(Aquinnah) v. Massachusetts Comm'n Against Discrimination, 63 F. Supp. 2d 119 (D. Mass. 1999) (Lindsay, J.). In the *MCAD* case, the Massachusetts Commission Against Discrimination sought to enforce Massachusetts employment discrimination law against the Tribe. *Id.* at 122. The Court ruled that the Tribe was immune from such enforcement. *Id.* at 125.

However, *MCAD* has little bearing on this case, and it certainly does not contradict *Shellfish Hatchery*. First, it predates *Shellfish Hatchery*.[13] Second, the waiver found by the *Shellfish Hatchery* court had to do specifically with land use; *MCAD* involved alleged employment discrimination. Indeed, *MCAD* mentioned the Settlement Agreement only cursorily and did not even examine it for possible waiver. *Id.* at 121, 123. Here, the Commonwealth and intervenors seek to prevent the Tribe from operating an unlicensed gaming facility on its land. For that reason, the *Shellfish Hatchery* determination that the settlement agreement contains a waiver as to the judicial enforcement of land-use laws is far more relevant to this analysis than is the *MCAD* determination that the Tribe was immune from judicial enforcement of employment-discrimination law.

Accordingly, the Tribe's motion to dismiss on the basis of sovereign immunity will be denied.

2. Failure to State a Claim

The Tribe further contends that the AGCHA complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. It contends that the Settlement Agreement, which serves as the basis for the AGHCA's breach of contract claim,

[13] Under the later-in-time rule of the Restatement (Second) of Judgments, the *Shellfish Hatchery* judgment (issued five years after *MCAD*) would control if it were inconsistent with the *MCAD* judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982) ("When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata.").

is not presently binding upon the Tribe, because (1) the agreement terminated in 1985 and (2) the Tribal Council did not have the power to bind the Tribe.

Both of those contentions are precluded by *Shellfish Hatchery*. In order to make its finding on waiver, the court in *Shellfish Hatchery* necessarily must have determined that the Settlement Agreement was both enforceable (that is, it did not expire in 1985) and binding upon the Tribe. Those subsidiary findings have preclusive effect on this proceeding. *See Alba*, 441 Mass. 836, 844; *Grella*, 42 F.3d 26, 30-31. The Court therefore cannot conclude that the AGHCA complaint fails to state a claim upon which relief can be granted.

Accordingly, the Tribe's motion to dismiss for failure to state a claim will be denied.

B. The Tribe's Motion to Dismiss for Failure to Join a Required Party

The Tribe has further moved to dismiss the claims of all three plaintiffs, with leave to amend, for failure to join a required party under Rule 19 of the Federal Rules of Civil Procedure. Rule 19 establishes a two-step inquiry for determining whether an action should be dismissed for failure to join a required party. First, the Court must determine whether an absent party is a person "to be joined if feasible" under Rule 19(a)—in other words, whether the absent party is "required." Fed. R. Civ. P. 19(a)(1). A party is "required" under Rule 19(a)(1) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

If the Court concludes that the absent party is "required" and that joinder is not feasible, then it must determine "whether, in equity and good conscience, the action should proceed among the existing parties, or[, alternatively, whether the action] should be dismissed." Fed. R. Civ. P. 19(b).[14] *See also Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118-19 (1968) ("The decision whether to dismiss (i.e., the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.").

Here, the Tribe has invoked Rule 19 based on the absence of the United States from this litigation. It contends that (1) the United States, as the trustee of the tribal lands in question, has a jurisdictional claim over the lands and thus a legal interest in asserting its jurisdiction to the exclusion of other sovereigns (such as the Commonwealth and the Town); and (2) that the NIGC (an arm of the United States government) has an interest in enforcing its approval of the Tribe's gaming ordinance against any restrictions that plaintiffs may try to impose on the Tribe's gaming activities. The Tribe contends that the United States is a required party that can feasibly be joined by plaintiffs. It therefore seeks dismissal of all three complaints, with leave to amend to join the United States.[15]

---

[14] Prior to 2007, Rule 19(b) used the term "indispensable" to describe a party whose absence required a dismissal. The 2007 amendment to the rule explained that the term had simply been used "to express a conclusion reached by applying the tests of Rule 19(b)" and that it was being "discarded as redundant." Fed. R. Civ. P. 19 advisory committee's note.

[15] The Tribe's memorandum in support of its motion equivocates as to which of the plaintiffs should be required to join the United States as a defendant. It first asks the Court to "dismiss each [c]omplaint and grant each party leave to amend in order to join the United States." (Defs' Mem. at 2). At another point, however, it appears to indicate that only the government plaintiffs should be required to join the United States. (*See id.* at 3 ("[T]he Court should grant the Tribe's Motion under Rule 19 with leave to amend the Commonwealth's and Town's Complaint(s) to join the NIGC as a party-defendant.")). Because the Court finds that joinder is not required, it does not resolve this ambiguity.

As detailed above, Rule 19(a) provides that a party is "required" if any of three circumstances is met. The Court will consider each of the three in turn.

1. Whether the Court Can Accord Complete Relief Among the Parties

The Tribe contends that neither it nor plaintiffs can be accorded complete relief without joinder of the United States. *See* Fed. R. Civ. P. 19(a)(1)(A). More specifically, it contends that a decision by this Court in its favor would not accord it complete relief, because plaintiffs could "avail themselves of a second bite at the apple by filing an APA action against NIGC challenging its approval of the Tribe's site-specific gaming ordinance." (Defs' Mem. at 7). And it contends that a decision in favor of plaintiffs would not accord them complete relief, as such a decision could subject the Commonwealth or the Town to litigation brought by the United States for encroachment upon its jurisdiction. (*Id.*).

Rule 19(a)(1)(A), however, "is concerned only with those who are already parties." *MasterCard Intern. Inc. v. Visa Intern. Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006); *see Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996) ("Completeness is determined on the basis of those persons who are already parties, and not as between a party and the absent person whose joinder is sought.") That is true even where "further litigation . . . is inevitable." *MasterCard Intern.*, 471 F.3d at 385; *see Angst*, 77 F.3d at 705 ("The possibility that the successful party to the original litigation might have to defend against a subsequent suit by the receiver does not make the receiver a necessary party to the action.").

The Court can accord complete relief among the parties currently involved in this case with respect to the claims at issue. The four parties (counting the Tribe as one) represent the four signatories to the Settlement Agreement. A judgment as to the rights of the parties under the agreement will bind all four parties and resolve the current dispute. Accordingly, no

additional parties are required on the basis of Rule 19(a)(1)(A).

2. Whether the United States Claims an Interest That May Be Impaired or Impeded by a Judgment in Its Absence

All parties appear to agree that the United States claims at least some level of interest in this litigation. As the Tribe notes, the United States holds legal title to the Settlement Lands as trustee for the Tribe. More generally, the very existence of legislation such as the IGRA and bodies such as the NIGC make clear that the federal government maintains a strong interest in overseeing Indian gaming activities. Further, the specific involvement of the NIGC and the Department of the Interior in this dispute, if not this case, confirms that the United States "claims an interest" in the matter.

The key question is whether disposing of this action in the absence of the United States is likely to "impair or impede [its] ability to protect [whatever] interest" that it does claim. Fed. R. Civ. P. 19(a)(1)(B)(i). Plaintiffs contend that the risk of unduly impairing the interest of the United States is low, because its interest is (1) apparently not strong enough to induce it to intervene and (2) substantially similar to that of the Tribe, such that the Tribe will be an adequate representative.

A party's decision not to intervene in litigation can be relevant to a determination as to whether that litigation will "impair or impede" the party's ability to protect its own interests. *See United States v. Sabine Shell, Inc.*, 674 F.2d 480, 483 (5th Cir. 1982) ("Furthermore, the property owners themselves, patently aware of this litigation, never intervened either at the district or appellate court level. Presumably the property owners do not believe that the disposition of this suit will 'impair or impede' their ability to protect their interests."); *Burger King Corp. v. Am. Nat. Bank & Trust Co. of Chicago*, 119 F.R.D. 672, 678 (N.D. Ill. 1988)

("Courts frequently consider the refusal of an absent party to seek intervention as a factor mitigating against the necessity of joining him pursuant to Rule 19(a)"). However, at least one court has held that "where intervention would require the absent party to waive sovereign immunity," a failure to intervene is irrelevant to a determination as to the prejudice caused by a judgment to that absent party. *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d 1491, 1498 (D.C. Cir. 1995).[16]

Plaintiffs contend that the apparent decision of the United States not to intervene in this litigation should be considered strong evidence that its interests would not be substantially impeded as a result of its absence. They contend that the United States is a sophisticated party that exercises "discretion as to where and how it litigates" and that if it "believes that its interests are in danger, it can move to intervene." (Pl. Opp. at 14, 15).

That factor, while entitled to substantial weight, is not conclusive. As the Tribe notes, the reason behind the failure to intervene on the part of the United States is not known. The Court cannot conclude that the United States has knowingly chosen not to intervene, after a determination that its interests will not be impeded in its absence, without some degree of speculation. Moreover, the United States may enjoy sovereign immunity with respect to suits relating to trust lands. *See, e.g.*, *United States v. Mitchell*, 445 U.S. 535, 537-38 (1980). In order to intervene, it presumably would need to waive its immunity. Where intervention would require an absent party to waive sovereign immunity, the inference that it does not have a substantial interest in the litigation may not be well-founded. *See Kickapoo Tribe*, 43 F.3d at 1498.

[16] Although an assessment of prejudice (under Rule 19(b)) is not identical to an assessment as to whether a party's interest would be "impaired or impeded" by a judgment (under Rule 19(a)), the two analyses are sufficiently analogous for the cited proposition to be relevant to both.

"If an absent party's interests are the same as those of an existing party, and the existing party will adequately protect those interests, this bears on whether the absent party's interest will be impaired by its absence from the litigation." *Tell v. Trustees of Dartmouth College*, 145 F.3d 417, 419 (1998). However, "without a perfect identi[t]y of interests, a court must be very cautious in concluding that a litigant will serve as a proxy for an absent party." *Id.* (citing 4 R.D. FREER, MOORE'S FEDERAL PRACTICE § 19.03[3][f], at 19–56 to 19–57 (3d ed.1998)).

The Tribe's interests do appear to align closely with those of the United States. The United States would presumably support the Tribe's position in all respects. To the extent that the United States has interests in protecting tribal lands, in preserving tribal sovereignty and tribal rights, and in upholding the jurisdiction of the NIGC and the integrity of its decision, those interests appear to be essentially identical to those of the Tribe. It is difficult to see how those interests might be likely to diverge, at least in the present context.

Nonetheless, the interests of the two parties may not be perfectly identical. In particular, the United States might take a broader viewpoint than that of the Tribe, which presumably will be focused solely on what it perceives are the protection of its own rights and prevailing in the case at hand. Thus, the United States may have an interest in upholding the federal regulatory scheme concerning Indian gaming, or ensuring that the law is properly interpreted.[17]

The critical question, though, is the extent to which those interests of the United States that are *not* represented by the Tribe may be "impaired or impeded" as a result of its absence from the litigation. Presumably, the United States always has an interest in ensuring that federal

[17] The Indian Gaming Regulatory Act "does not unambiguously impose upon the United States the duty to ensure that Indian gaming continue under any circumstances." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1298 (D.N.M. 1996). By contrast, the goal of the Tribe in this litigation might be to ensure exactly that.

law is properly interpreted and enforced. While that interest is important, and certainly could be impacted by the decision in this case, such an interest may exist in every dispute involving an Indian tribe (or, for that matter, federal law). The federal government cannot be a required party in all such suits. Moreover, the effect of a judgment must be "direct and immediate" in order to impede an absent party's ability to protect its rights sufficiently to trigger Rule 19. *See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993). If such an effect is likely here, it is not obvious, at least based on present record. The more "direct and immediate" governmental interest at stake in this litigation—protection of the Tribe's land-use rights—is an interest that the United States appears to share with the Tribe. The Tribe is clearly an adequate representative with respect to this interest. Therefore, the ability of the United States to protect its interests is not likely to be "impaired or impeded" by a judgment in its absence.

3. Whether Disposing of the Action in the Absence of the United States May Subject a Party to a Substantial Risk of Inconsistent Obligations

Pursuant to Rule 19(a)(1)(B)(ii), an absent party is a "required" party if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in the [party's] absence may . . . leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). The Tribe contends that a decision in plaintiffs' favor in the absence of the United States would yield such a result. Such a decision would subject the Tribe to regulation under Massachusetts state law, but it would not bind the NIGC; consequently, the Tribe would remain subject to federal law as well. According to the Tribe, it would be placed in an "untenable" "Catch-22" in which "[p]roceeding under State law would require that the Tribe

violate federal law; proceeding under federal law would require that the Tribe violate State law." (Defs' Mem. at 10).

It is unclear how the Tribe would be "required" to violate either state or federal law by a ruling in favor of the Commonwealth. Applying for a state gaming license would not necessarily violate federal law; in our federal system, parties must often comply with the regulations of multiple sovereigns in order to engage in certain activities.[18] While it is conceivable that the Tribe's obligations under federal and state law could conflict, the Tribe has not shown that there is a real possibility, much less a "substantial risk," that that would occur. Moreover, the Tribe is under no obligation to operate a gaming facility; if applying for a state gaming license would somehow violate federal law, the Tribe has the option to engage in no gaming at all.[19]

In sum, the absence of the United States will not prevent this Court from according complete relief among the parties, and the United States is not situated such that its absence would either (1) substantially impair its ability to protect its interests or (2) create a substantial risk that an existing party will be subject to inconsistent obligations in the future.

Accordingly, the United States is not a required party under Rule 19, and the Tribe's motion to dismiss for failure to join a necessary party will be denied.

C. Motion to Dismiss the Counterclaims

The Tribe has filed counterclaims against the Commonwealth and three third-party defendants—the Governor and Attorney General of the Commonwealth and the Chairman of the

[18] For example, a particular land development activity might require both federal and state environmental permits. If the federal government issues such a permit, but the state government does not, the landowner is not faced with "inconsistent" obligations; he simply cannot undertake the activity unless and until he receives the required state permit.

[19] Even if compliance with state law somehow creates a conflict with a federal obligation, it is unlikely that the NIGC would bring an enforcement action against the Tribe for complying with a decision of this Court.

Massachusetts Gaming Commission. The counterclaims consist of two claims for a declaratory judgment and one for injunctive relief.

The counterclaim-defendants contend that the counterclaims should be dismissed, in whole or in part, on three grounds: (1) sovereign immunity bars all claims against the Commonwealth; (2) the counterclaims against the individual third-party defendants are not cognizable under *Ex Parte Young*; and (3) the claim for injunctive relief fails to state a claim against all defendants.

1. Sovereign Immunity of the Commonwealth

The Eleventh Amendment to the United States Constitution bars lawsuits in federal courts against nonconsenting states. *Rosie D. ex rel. John D. v. Swift*, 310 F.3d 230, 234 (1st Cir. 2002); *see Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court."). A waiver by a state of sovereign immunity in its own courts does not constitute a waiver of immunity in federal courts. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984).

A state that files a federal complaint or removes a case to federal court has likely waived its immunity, at least in part. *See Lapides v. Bd. of Regents of Univ. System of Georgia*, 535 U.S. 613, 620 (2002) (removal); *Skelton v. Henry*, 390 F.3d 614, 618 (8th Cir. 2004) (filing a federal complaint). By contrast, "a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring); *United States v. Metropolitan St. Louis Sewer Dist.*, 578 F.3d 722, 725 (8th Cir. 2009) ("[A] state does not waive its immunity by entering a general appearance or by defending a case in federal court so long as it asserts its

Eleventh Amendment sovereign immunity defense in a timely manner.").

Where a state plaintiff voluntarily submits to federal-court jurisdiction—for example, by filing a federal complaint—the state has "made itself a party to the litigation to the full extent required for its complete determination." *Clark v. Barnard*, 108 U.S. 436, 448 (1883). However, "federal courts have consistently held that a state plaintiff does not waive its sovereign immunity with respect to all plausible counterclaims." *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 502 (N.D. Ill. 1985). Such a counterclaim is cognizable only if it "arises from the same event underlying the state's cause of action, and only if the claimant asserts his or her claim defensively by way of recoupment to defeat or diminish the state's recovery." *In re Dep't of Energy Stripper Well Exemption Litig.*, 956 F.2d 282, 285 (Temp. Emer. Ct. App. 1992). The counterclaim is not cognizable if it is "for the purpose of obtaining an affirmative judgment against the State." *Woelffer*, 626 F. Supp. at 502.

Here, the Commonwealth contends that it has not waived its sovereign immunity to suit in federal court. It initially filed this action in Massachusetts state court; only after the Tribe removed the action did the Commonwealth appear in federal court. Moreover, the Commonwealth did not consent to the jurisdiction of this Court, instead moving to remand the case back to state court. Although it is the plaintiff in this action, its posture with respect to the forum is similar to that of a defendant; it is not in federal court of its own volition. If a state that appears and defends in federal court has not waived its immunity, it stands to reason that a state in the Commonwealth's current position has also not waived its immunity. *See Metropolitan St. Louis Sewer Dist.*, 578 F.3d at 725.

Even if the Commonwealth were to be treated as having voluntarily invoked the jurisdiction of this Court, at least one of the Tribe's counterclaims would not be cognizable. The

Tribe's request for injunctive relief—seeking to enjoin counterclaim-defendants from interfering with gaming activities that occur on the Tribe's lands—represents an effort to "obtain[] an affirmative judgement against the [Commonwealth]." *Woelffer*, 626 F. Supp. at 502. It is therefore "not sufficiently equivalent to a recoupment or set-off to fall within the narrow exception to sovereign immunity recognized by the courts." *Id.* at 503 (finding that a counterclaim for injunctive relief was not cognizable against a state plaintiff that had requested only declaratory relief).

The Tribe's requests for a declaratory judgment arguably rest on a different footing. The Tribe has asked this Court to declare (1) that Congress abrogated the Commonwealth's jurisdiction over the Tribe's lands in enacting the IGRA and (2) that the NIGC's approval of the gaming ordinance preempted state law. The operative questions are whether those counterclaims "arise[] from the same event underlying the state's cause of action" and whether they are asserted "defensively by way of recoupment to defeat or diminish the state's recovery." *See Energy Stripper Well*, 956 F.2d at 285.

The Commonwealth contends that the Tribe's requests for a declaratory judgment go far beyond the relief sought by the Commonwealth, in that they "request that this Court rule on the validity and intent of federal action" and "arise[] out of an entirely separate federal process in which the Commonwealth had no involvement." (Counterclaim-Defendants' Mem. at 5). While a state plaintiff may impliedly consent to some defensive counterclaims, it "does not thereby consent to an affirmative judgment on a counterclaim." *In re Greenstreet, Inc.*, 209 F.2d 660, 664 (7th Cir. 1954). A declaration as to the abrogation effect of the IGRA or the preemption effect of the gaming ordinance might qualify as an "affirmative judgment," at least as compared to a narrow declaration that the Tribe is not subject to the jurisdiction of the Commonwealth.

However, in deciding whether plaintiff has jurisdiction over the Tribe's lands under the Settlement Agreement, this Court must necessarily determine whether any federal law has abrogated or preempted that jurisdiction. For that reason, adjudication of plaintiff's declaratory-judgment request will necessarily require analysis and application of federal Indian gaming law, including the IGRA and the NIGC process. In that respect, the Tribe's requests for declaratory relief are no broader than those of the Commonwealth. They might, therefore, qualify as defensive counterclaims that would ordinarily be cognizable against a state plaintiff.

Again, however, the Commonwealth is not in the position of an ordinary state plaintiff. It has not made a "voluntary submission" to the jurisdiction of this Court. *See Woelffer*, 626 F. Supp. at 502 (quoting *Clark*, 108 U.S. at 447). It brought this action in state court and sought remand once the action was removed to federal court. It has not taken any action that could be construed as a waiver of sovereign immunity, either express or implied. Therefore, the Tribe's declaratory-judgment counterclaims are not cognizable.

The Tribe contends that if it is held to have waived its sovereign immunity in the Settlement Agreement, then the Commonwealth must also have waived its sovereign immunity in that same document. But the Tribe's potential waiver of immunity is tied to specific language within the Settlement Agreement that conditioned its receipt of the Settlement Lands. The Settlement Agreement does not contain any similar language relating to the Commonwealth. Moreover, this Court's determination that the Tribe waived its sovereign immunity is partially based on the issue-preclusive effect of the Massachusetts Supreme Judicial Court's decision in *Shellfish Hatchery*. No such consideration applies to an analysis of the Commonwealth's sovereign immunity.

Finally, it is important to note that no inequity is likely to result should the Tribe's

counterclaims be dismissed. As a general rule, defendants are required to state as a counterclaim any claim that "arises out of the same transaction or occurrence that is the subject matter of the [plaintiff's] claim." Fed. R. Civ. P. 13(a). A defendant who neglects to follow this "compulsory counterclaim" rule could be barred from bringing the claim in a later proceeding. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) ("A counterclaim which is compulsory but is not brought is thereafter barred."). Here, however, the Court will necessarily rule on the issues raised by the Tribe's counterclaims—the effect of both the IGRA and the issuance of the gaming ordinance by the NIGC will be considered in conjunction with plaintiff's claims. Thus, the Tribe can obtain the essential relief it seeks even without a direct ruling on its declaratory-judgment claims. *See Williams v. Secretary of Exec. Office of Human Servs.*, 414 Mass. 551, 570 (1993) ("In declaratory judgment actions, even where relief is denied, the rights of the parties must be declared.").

Accordingly, the Tribe's counterclaims against the Commonwealth will be dismissed on the basis of sovereign immunity.

2. Sovereign Immunity of Third-Party Defendants

The Tribe has also asserted its counterclaims against three individual third-party defendants: the Governor, the Attorney General of the Commonwealth, and the Chairman of the Massachusetts Gaming Commission. All three were sued in their official capacity.

State officials enjoy limited sovereign immunity to suit in federal court, but can be sued in their official capacity in federal court under some circumstances. *See Ex Parte Young*, 209 U.S. 123 (1908). Under the *Ex Parte Young* doctrine, individuals can sue state officials only for "prospective injunctive relief." *Rosie D.*, 310 F.3d at 234. The doctrine "does not permit judgments against state officers declaring that they violated federal law in the past" or any other

"claims for retrospective relief." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993); *Green v. Mansour*, 474 U.S. 64, 68 (1985). "In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Virginia Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011).

Here, counterclaim-defendants do not dispute that the counterclaims request relief that is "properly characterized as prospective." *See id.* Instead, they contend that the Tribe has not "allege[d] an ongoing violation of federal law." *See id.*

The Tribe's amended answer specifically alleges that each of the individual defendants "intends to use [his/her] office and authority under the laws of the Commonwealth of Massachusetts to stop [the Tribe] from proceeding with [its] plans to open and operate a Class II gaming facility under IGRA and tribal law." (Amended Answer at ¶¶ 100-02). According to counterclaim-defendants, that is not sufficient to allege an ongoing violation of federal law, because "[t]he Tribe does not allege that such conduct, even if undertaken, constitutes a violation of IGRA or other federal law." (Counterclaim-Defendants' Mem. at 7). But a state official need not be violating a federal statute to be subject to suit under *Ex Parte Young*; all that is required is an allegation that the official is interfering, or is about to interfere, with a federally protected right. *See Timpanogos Tribe v. Conway*, 286 F.3d 1195 (10th Cir. 2002) (finding that *Ex Parte Young* doctrine applied where plaintiff tribe sought injunctive relief to stop officials from interfering with the tribe's right to hunt and fish on Indian land). Taking the allegations in the counterclaims to be true, that requirement is satisfied here.

Accordingly, the counterclaims against third-party defendants are cognizable under the

Ex Parte Young doctrine.

3. Claim for Injunctive Relief

Counterclaim-defendants further contend that the counterclaim for injunctive relief must be dismissed as against all parties because the Tribe has not alleged a sufficient threat of future injury and thus lacks standing. Because the Court has decided that all counterclaims against the Commonwealth will be dismissed on sovereign immunity grounds, this section will analyze the claim for injunctive relief only as it relates to the individual third-party defendants.

In order to establish constitutional standing, a plaintiff seeking injunctive relief "must allege a real and immediate threat of future injury." *Connor B. ex rel. Vigurs v. Patrick*, 771 F. Supp. 2d 142, 152 (D. Mass. 2011) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983). Counterclaim-defendants contend that the allegations in the counterclaim are overly vague, as they allege only that counterclaim-defendants "intend[] to stop [the Tribe] from proceeding with [its] plans to open and operate a Class II gaming facility under IGRA and tribal law" and do not provide any further factual context. (Amended Answer at ¶¶ 100-02).

It is true that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). Here, however, the factual context is clear: the very existence of this lawsuit provides ample proof that the Commonwealth and its officials intend to block the Tribe from operating a gaming facility. Under the circumstances, it would defy common sense to conclude that the Tribe's allegations do not establish "plausible grounds" for its right to relief. *See Twombly*, 550 U.S. at 545.

Counterclaim-defendants further contend that the Tribe's claim for injunctive relief is overly broad. They contend that enjoining them "from interfering with gaming activities that occur on the Tribe's trust lands," as the Tribe requests, could conceivably prevent the officials from (among other things) making public statements about the Tribe's gaming activities; managing environmental disasters that impact Tribal lands; or approving gaming licenses for non-Tribal entities that might compete with the Tribe's operation. (Amended Answer at 16; Counterclaim-Defendants' Mem. at 10).

Putting aside counterclaim-defendants' interpretation of the scope of the injunctive relief requested, their objection is at best premature. At this stage, the precise form of the injunctive relief need not be considered. *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 353 (E.D.N.Y. 2007) ("[A] motion for failure to state a claim properly addresses the cause of action alleged, not the remedy sought. It is the court that will craft any remedy."); *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 286 ("Objections that particular provisions of the injunctive relief requested place an impermissible burden on interstate commerce can be considered on a case-by-case basis in a subsequent phase of this litigation if it becomes necessary to do so."); *United States by Clark v. Georgia Power Co.*, 301 F. Supp. 538, 543 (N.D. Ga. 1969) ("Rule 65(d) [of the Federal Rules of Civil Procedure] refers to the form of an injunction or a restraining order, and is silent as to the specificity required in the complaint's request for injunction."). If the Court does grant any injunctive relief, it can limit or shape that remedy as principles of equity and proper respect for federal-state relations may require.

Accordingly, the motion to dismiss the counterclaim for injunctive relief against the individual defendants will be denied.

IV. Conclusion

For the foregoing reasons,

1. Defendants' motions to dismiss are DENIED; and

2. Counterclaim-defendants' motion to dismiss is GRANTED to the extent it seeks dismissal of the counterclaims against the Commonwealth, and is otherwise DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: February 27, 2015

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLIE BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

MEMORANDUM AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

SAYLOR, J.

This lawsuit involves a dispute over gaming on Indian lands on Martha's Vineyard. The Wampanoag Tribe of Gay Head (Aquinnah) and related entities have taken steps to commence

commercial gaming operations on tribal lands in the town of Aquinnah.[1] The Tribe does not have a state gaming license. The Commonwealth of Massachusetts contends that operating gaming facilities without such a license would violate a 1983 agreement, approved by Congress in 1987, that subjects the lands in question to state civil and criminal jurisdiction (and specifically to state laws regulating gaming). Count 1 of the complaint alleges breach of contract, and Count 2 seeks a declaratory judgment.

The Commonwealth, the Town of Aquinnah, the Aquinnah/Gay Head Community Association, and the Tribe have all moved for summary judgment. For the reasons stated below, the Tribe's motion will be denied and the motions of the Commonwealth, the Town, and the AGHCA will be granted.

This case presents two fairly narrow issues. The first is whether a statute passed by Congress in 1988 (the Indian Gaming Regulatory Act, or IGRA) applies to the lands in question, which in turn raises the questions whether the Tribe exercises "jurisdiction" and "governmental power" over the lands. The second is whether IGRA repealed, by implication, the statute passed by Congress in 1987 (the act that approved the 1983 agreement). If the 1988 law (IGRA) controls, the Tribe can build a gaming facility in Aquinnah. If the 1987 law controls, it cannot.

Whether an Indian tribe should be permitted to operate a casino on Martha's Vineyard is a matter of considerable public interest, and the question touches upon a variety of complex and significant policy issues. This lawsuit is not, however, about the advisability of legalized gambling. Nor is it about the proper course of land development on Martha's Vineyard, or how

[1] According to the Commonwealth, the Aquinnah Wampanoag Gaming Corporation is a wholly-owned subsidiary of the Tribe or the Wampanoag Tribal Council of Gay Head, Inc. According to defendants, the Wampanoag Tribal Council of Gay Head, Inc., no longer exists. (Defs.' Notice of Removal 1 n.1). For the sake of convenience, the Court will refer to defendants collectively as "the Tribe."

best to preserve the unique environment and heritage of the island. And it is not about the appropriate future path for the Wampanoag people. If there are answers to those questions, they are properly left to the political branches in our system of government. The role of the Court here is a narrow one, and it expresses no opinion of any kind about the broader issues underlying this dispute. *See Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) ("Under our tripartite system of government, Congress, not the courts, is empowered to make such policy choices. . . . Thus, the courts have not focused on the wisdom of the policies underlying [IGRA] . . . .").

I. Background

A. Factual Background

Unless otherwise stated, the following facts come from the parties' joint statement of material facts not in dispute ("SMF").

1. The Tribe

At the time of the first contact with Europeans, the Wampanoag tribe lived in what is now southeastern New England, including Cape Cod, Nantucket, and Martha's Vineyard. *See generally Wampanoag Indians*, The American Indian Heritage Foundation, www.indians.org/articles/wampanoag-indians.html; *History & Culture*, The Wampanoag Tribe of Gay Head (Aquinnah), www.wampanoagtribe.net/Pages/Wampanoag_WebDocs. In the 1600's, the tribe was devastated by disease, warfare, and other forces. *See id.* By the mid-1800's, the tribe had been reduced to a few small groups, including the present-day Wampanoag Tribe of Gay Head, which occupied the western tip of Martha's Vineyard. *See id.*

In 1869 and 1870, the Commonwealth of Massachusetts took a series of steps that were intended, among other things, to permit the alienation of Indian land and assimilate tribal

members as full citizens. *See Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 945-46 (D. Mass. 1978). As part of that process, the Commonwealth incorporated the Town of Gay Head in 1870. (SMF ¶ 2).[2]

In 1972, the Wampanoag Tribal Council of Gay Head, Inc., was founded as a state-chartered non-profit corporate entity. (*Id.* at ¶ 4). As of that time, the Tribe was not officially recognized by the United States Government. (*Id.* at ¶ 6).

In 1974, the Wampanoag Tribal Council, on behalf of the Tribe, sued the Commonwealth, the Town of Gay Head, and the Taxpayers' Association of Gay Head, Inc., asserting aboriginal property rights to certain lands within the town. *See Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, 74-5826-G (D. Mass.). The Tribe contended that the various transfers of tribal lands in the nineteenth century violated the 1790 Non-Intercourse Act, which required federal approval for any extinguishment of Indian title. *Id.*

2. The Settlement Acts

The land-rights lawsuit was not resolved for nearly a decade. Finally, in November 1983, the Commonwealth; the Town of Gay Head; the Taxpayers' Association of Gay Head, Inc.; and the Wampanoag Tribal Council of Gay Head, Inc., entered into a settlement agreement that they termed a "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts Indian Land Claims" (the "Settlement Agreement"). (SMF ¶¶ 10-11).

As part of the settlement, the Town and the Taxpayers' Association conveyed to the Wampanoag Tribal Council approximately 485 acres of land (the "Settlement Lands") to be held "in the same manner, and subject to the same laws, as any other Massachusetts corporation." (*Id.* at Ex. B ¶ 3). In return, the Tribal Council relinquished all claims to other lands and waters in

[2] In 1997, the Town of Gay Head changed its name to Aquinnah.

the Commonwealth. (*Id.* at Ex. B ¶ 8). The Settlement Agreement provided that "[u]nder no circumstances, including any future recognition of the existence of an Indian tribe in the Town of Gay Head, shall the civil or criminal jurisdiction of the Commonwealth . . . over the settlement lands . . . be impaired or otherwise altered" and "no Indian tribe or band shall ever exercise sovereign jurisdiction" over those lands. (*Id.* at Ex. B ¶ 3). The Tribe agreed that the Settlement Lands would be "subject to all Federal, State, and local laws, including Town zoning laws." (*Id.* at Ex. B ¶¶ 5, 13). The Settlement Agreement set forth two exceptions to that provision, specifying that the Settlement Lands would be exempt from state property taxes and hunting regulations. (*Id.* at Ex. B ¶ 13(a)-(b)).

In 1985, the Massachusetts Legislature enacted a statute implementing the Settlement Agreement. (*Id.* at ¶ 13).[3] For the Settlement Agreement to take effect, however, it required Congressional approval. *See Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

Meanwhile, in 1981, the Tribal Council had submitted a petition seeking the acknowledgement of the Tribe by the United States as an Indian tribe with a government-to-government relationship with the United States. (SMF ¶ 9). In 1987—after the execution of the Settlement Agreement, but before Congress passed the implementing statute—the Department of the Interior officially recognized the Wampanoag Tribe of Gay Head as an Indian tribe. *See* Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (Feb. 10, 1987).

On August 18, 1987, Congress passed the act implementing the Settlement Agreement. *See* Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-95, 101 Stat. 704 (codified at 25 U.S.C § 1771) ("Massachusetts Settlement

[3] *See* An Act to Implement the Settlement of the Gay Head Indian Land Claims, Mass. Stat. 1985, c. 277.

Act"). The Massachusetts Settlement Act contained the following language: "Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g.

The Bureau of Indian Affairs of the United States Department of the Interior then took the Settlement Lands into trust. (SMF ¶ 19). Since the enactment of the Massachusetts Settlement Act, the Commonwealth, the Town, and the Tribe have all exercised concurrent jurisdiction over the Settlement Lands pursuant to its provisions. (*Id.* at ¶ 22).

3. *Cabazon Band* and IGRA

As noted, the Massachusetts Settlement Act was enacted by Congress on August 18, 1987. *See* Pub. L. No. 100-95, 101 Stat. 704. Only six months earlier, on February 25, 1987, the Supreme Court had issued an opinion that essentially prohibited states from enforcing gambling laws on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon Band*, two California Indian tribes were sponsoring unregulated gaming activities on their reservations. *Id.* at 205. When California attempted to enforce a state statute regulating bingo operations against the tribes, the tribes sued, asserting that California had no authority to enforce its gambling laws on tribal reservations because the United States had not authorized California to do so. *Id.* at 205-06. California argued that its bingo statute was a criminal law that could be enforced on Indian reservations pursuant to federal law. *Id.* at 207. The Court rejected

that argument, holding that the statute was not criminal in nature, and therefore the state could not prohibit the tribes from offering gaming activities on their reservations. *Id.* at 221-22.

"*Cabazon Band* led to an explosion in unregulated gaming on Indian reservations" in states that did not prohibit gaming. *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1330 (5th Cir. 1994). Congress quickly became concerned that unregulated growth in Indian gaming might, among other things, "invite criminal elements." *Id.* It passed the Massachusetts Settlement Act, with its specific reference to state regulation of gaming on Indian lands, in August 1987. And on October 17, 1988, it enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("Congress adopted IGRA in response to this Court's decision in [*Cabazon*], which held that States lacked any regulatory authority over gaming on Indian lands.").

According to its legislative history, IGRA "was intended to balance the right of tribes to self-government with the need 'to protect both the tribes and the gaming public from unscrupulous persons.'" *Ysleta*, 36 F.3d at 1330 (quoting S. Rep. No. 100-446, at 1-2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071). The Senate Report specifically noted that IGRA was born out of "fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements." S. Rep. No. 100-446, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.

Among other things, IGRA established a regulatory structure for gaming on Indian lands and created the National Indian Gaming Commission ("NIGC"). That structure categorized gaming into three "classes": class I included "social games solely for prizes of minimal value or traditional forms of Indian gaming"; class II encompassed, among other things, "the game of chance commonly known as bingo" and some card games (with "banking card games, including

baccarat, chemin de fer, [and] blackjack" specifically excepted from the class); class III was a catch-all category that included all forms of gaming not encompassed by classes I or II. 25 U.S.C. § 2703(6)-(8).

Under IGRA, a tribe's right to conduct and regulate gaming on its lands are subject to two relevant restrictions. First, IGRA confers upon qualifying tribes the "exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law." 25 U.S.C. § 2701(5). Second, a tribe may conduct class II gaming only "on Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(1). Specifically, as to class II gaming, the statute provides:

> (1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—
>
> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and
>
> (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

Id.

4. Precursors to the Present Controversy

In 1997, the Acting Assistant Secretary of Indian Affairs for the Department of the Interior sent the Tribe a letter addressing whether the Tribe could conduct class II gaming activities on certain lands. (SMF ¶¶ 26-27). The letter expressed the opinion "that the Tribe would be eligible to conduct [c]lass II gaming activities" on land held in trust for it by the United States, as long as it "complie[d] with all applicable requirements of [ ] IGRA." (*Id.* at Ex. G).

On November 22, 2011, then-Governor of Massachusetts Deval Patrick signed a law entitled "An Act Establishing Expanded Gaming in the Commonwealth." *See* Mass. Gen. Laws

ch. 23K, § 37, ch. 271, § 3 ("Expanded Gaming Act"). Among other things, the law prohibited any person or entity from opening or operating a gaming establishment in Massachusetts without a gaming license. *Id.*

On that same day, the Tribe submitted a Tribal Gaming Ordinance, numbered Ordinance No. 2011-01, to the NIGC for review. (SMF ¶ 40). The statement of purpose contained within the ordinance read:

> An ordinance to govern and regulate the operation, conduct and playing of (1) Class I Gaming, and (2) Class II Gaming, as defined by IGRA, so that revenue may be produced for the support of Tribal government programs, to promote economic development, and for the health, education and welfare of the Tribe and its members. The Tribal Council of the Wampanoag Tribe of Gay Head (Aquinnah) enacts this Ordinance in order to regulate all forms of Gaming on the Tribe's Indian Lands.

Ordinance No. 2011-01, § 1.3.

On February 4, 2012, the Tribe passed Resolution 2012-04, which formally adopted Ordinance No. 2011-01. (SMF ¶¶ 37-39, Ex. P).

On February 21, 2012, the NIGC issued a letter approving Ordinance No. 2011-01 as it related to class I and class II gaming. (*Id.* at ¶ 42). The letter specifically noted that the ordinance was "approved for gaming only on Indian lands, as defined by the [IGRA], over which the Tribe exercises jurisdiction." (*Id.* at Ex. R).

On March 5, 2012, the Tribe delivered two letters to Governor Patrick requesting that the Commonwealth enter into negotiations for a gaming compact that would allow the Tribe to conduct class III gaming. (*Id.* at ¶ 30). One letter requested that the Commonwealth "enter into formal gaming compact negotiations pursuant to the requirements set forth in [IGRA]," and the other requested that the Commonwealth "enter gaming compact negotiations pursuant to the requirements set forth in Section 91 of the Expanded Gaming Act." (*Id.* at Exs. H, I).

On March 14, 2012, counsel for Governor Patrick requested that the Tribe provide certain additional information in connection with its requests for a compact. (*Id.* at ¶ 31). Specifically, the letter sent by counsel requested "documents which evidence that (1) the Tribe has purchased, or entered into an agreement to purchase, a parcel of land for the proposed tribal gaming development and (2) a vote has been scheduled in the host communities for approval of the proposed tribal gaming development." (*Id.* at Ex. J). The Tribe responded to that letter on March 27, 2012, with correspondence that provided the requested information. (*Id.* at Ex. K).

On April 7, 2012, the Tribe passed Resolution 2012-23, amending Ordinance No. 2011-01 by altering the definition of "Indian Lands." (*Id.* at ¶ 44, Ex. S). As amended, "Indian Lands" was defined to include 238 acres of land defined in the Massachusetts Settlement Act as "Public Settlement Lands" and 175 acres of land defined in the Massachusetts Settlement Act as "Private Settlement Lands." (*Id.*).

On April 12, 2012, the Tribe submitted Resolution 2012-23 and the amended version of Ordinance No. 2011-01 to the NIGC for review and approval. (*Id.* at ¶ 46, Ex. T).

On April 20, 2012, counsel for Governor Patrick sent further correspondence to the Tribe in connection with its request for a gaming compact. (*Id.* at ¶ 33, Ex. L). The letter offered to set a meeting on April 24, 2012. (*Id.*).

On July 10, 2012, the Tribe withdrew the request for review that it had made to the NIGC in its April 12, 2012 letter. (*Id.* at ¶ 48, Ex. U).

On May 30, 2013, the Tribe re-submitted a site-specific Ordinance No. 2011-01, as amended by Resolution 2012-23, to the NIGC for review and approval. (*Id.* at ¶ 50, Ex. V). The cover letter attached to that request stated that the Tribe "ha[d] determined that it [wa]s in the

best interest of [its] community to proceed with its class II gaming endeavors" and requested an expedited review. (*Id.*).

On June 13, 2013, the NIGC sent a letter to the Department of the Interior's Office of the Solicitor, requesting an opinion as to whether the Massachusetts Settlement Act prohibited the Tribe from gaming on the Settlement Lands. (*Id.* at ¶ 52). The office's Division on Indian Affairs responded on August 23, 2013, with a letter providing the opinion that the Tribe was not prohibited from gaming on the Settlement Lands. (*Id.* at ¶ 53, Ex. W).

On August 29, 2013, the NIGC informed the Tribe by letter that Ordinance No. 2011-01, as amended by Resolution 2012-23, was approved by the NIGC by operation of law, "to the extent that it is consistent with IGRA." (*Id.* at ¶ 54, Ex. X).[4] On that same day, the Tribe responded and requested "a legal opinion . . . as to whether the Indian lands identified in the amendment [effectuated by Resolution 2012-23] are eligible for gaming under [IGRA]." (*Id.* at ¶ 56, Ex. Y).

On October 25, 2013, the NIGC responded to the Tribe's August 29 correspondence with a letter providing the opinion that the lands identified in the amendment were "eligible for gaming under [IGRA]." (*Id.* at ¶ 58, Ex. Z).

On November 12, 2013, the Tribe wrote a letter to Governor Patrick "restat[ing] and renew[ing] its March 5, 2012 request to enter into formal gaming compact negotiations with the Commonwealth of Massachusetts under the requirements of . . . IGRA." (*Id.* at ¶ 34, Ex. M). The Tribe attached its correspondence with the NIGC to its November 12, 2013 letter. (*Id.*).

On December 5, 2013, counsel for the Tribe met with Governor Patrick to discuss the Tribe's request for gaming-compact negotiations. (*Id.* at Ex. N). On December 18, 2013,

[4] A gaming ordinance is automatically approved by the NIGC, by operation of law, if it does not act on the ordinance within 90 days. *See* 25 U.S.C. § 2710(e).

counsel for Governor Patrick sent further correspondence to the Tribe, stating its position "that the Tribe, as part of the bargain it agreed to in exchange for its land settlement in the 1980s, waived its federal right to conduct Indian gaming except in conformity with state law." (*Id.*).

Massachusetts law prohibits any entity from operating a gaming establishment without a license issued by the Massachusetts Gaming Commission. *See* Mass. Gen. Laws ch. 23K, §§ 2, 9, 25. The Tribe has not obtained such a license nor complied with the Massachusetts prerequisites for doing so. (SMF ¶ 36).

B. Procedural Background

On December 2, 2013, the Commonwealth filed a complaint with the Single Justice of the Supreme Judicial Court for Suffolk County against the Tribe, the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation. The complaint asserted a claim for breach of contract and requested a declaratory judgment that the Settlement Agreement allowed the Commonwealth to prohibit the Tribe from conducting gaming on the Settlement Lands.

On December 30, 2013, the Tribe removed the action to this Court on grounds of federal-question and supplemental jurisdiction. On January 29, 2014, the Commonwealth moved to remand the action to state court, which the Court denied.

On July 10, 2014, both the AGHCA and the Town filed motions to intervene. The Court granted those motions on August 6, 2014. On August 27, 2014, the Tribe moved to dismiss the AGHCA complaint on the grounds of sovereign immunity and failure to state a claim upon which relief can be granted. On that same day, the Tribe separately moved to dismiss all three complaints, with leave to amend, for failure to join the United States, which it asserted was a required party under Fed. R. Civ. P. 19.

On October 24, 2014, the Tribe filed an amended answer to the Commonwealth's complaint. The amended answer included counterclaims against the Commonwealth and claims against three third-party defendants, all of whom are government officials of the Commonwealth sued in their official capacity.[5] (For the sake of convenience, the Court will refer to those claims collectively as the "counterclaims," and those defendants as "counterclaim-defendants"). The counterclaims sought declaratory and injunctive relief concerning the Commonwealth's assertion of jurisdiction over gaming that occurs on the Tribe's trust lands. On November 19, 2014, the Commonwealth and the third-party defendants moved to dismiss the counterclaims.

On February 27, 2015, the Court denied the Tribe's motions to dismiss and granted the motion by the Commonwealth to dismiss the counterclaims against it. Remaining are the claims by the Commonwealth, the AGHCA, and the Town against the Tribe, and the Tribe's counterclaims against the government officials.

On May 28, 2015, the Commonwealth, the Town, the AGHCA, and the Tribe all moved for summary judgment.[6]

II. Legal Standard

The role of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. General Elec. Co.*, 950 F.2d 816,

[5] The original counterclaims named then-Governor Deval Patrick, then-Attorney General Martha Coakley, and Chairman of the Massachusetts Gaming Commission Stephen Crosby as third-party defendants. Patrick and Coakley no longer serve in the capacities listed, having been replaced by Governor Charles D. Baker and Attorney General Maura Healey. Accordingly, Governor Baker, Attorney General Healey, and Crosby are the third-party defendants as the case currently stands.

[6] On July 14, 2015, the Town moved for a temporary restraining order and/or a preliminary injunction enjoining the Tribe from undertaking any further construction of a gaming facility at the site of its community center building. The AGHCA and the Commonwealth each filed memoranda in support of that motion, and the Tribe filed an opposition. On July 28, 2015, after a hearing, the Court entered a preliminary injunction enjoining and restraining the Tribe from commencing or continuing the construction of a gaming facility at or on the Wampanoag Community Center building site without first complying with the permit requirements of the Town of Aquinnah, pending further order of the Court.

822 (1st Cir. 1991) (internal quotation marks omitted). Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Essentially, Rule 56[ ] mandates the entry of summary judgment 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1121 (1st Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). In making that determination, the court must view "the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009). When "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-moving party may not simply "rest upon mere allegation or denials of his pleading," but instead must "present affirmative evidence." *Id*. at 256-57.

III. Analysis

This action essentially requires the Court to answer two questions: (1) whether IGRA applies to the Settlement Lands (which requires that the Tribe both (a) have "jurisdiction" and (b) exercise "governmental power" over the lands); and (2) whether IGRA impliedly repealed the Massachusetts Settlement Act, which expressly stated that any lands held in trust for the Tribe would "be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." 25 U.S.C. § 1771g.

A. The Burden of Proof

The Commonwealth's complaint alleges a claim for breach of contract (that is, that the Tribe has breached the Settlement Agreement). The Tribe's principal response is an affirmative defense of contract invalidity (that is, that IGRA applies to the lands and supersedes the Massachusetts Settlement Act and the underlying Settlement Agreement). Because it is an affirmative defense, the Tribe has the burden of proving that the contract is invalid. *See Saybrook Tax Exempt Investors LLC v. Lake of Torches Econ. Dev. Corp.,* 929 F. Supp. 2d 859, 862-63 (W.D. Wis. 2013) ("[R]ebutting IGRA is not part of the cause of action [for breach of contract] itself. . . . [I]t is by now well-settled federal law that contract invalidity is a defense, and that the defeat of potential invalidity defenses is not an element of an affirmative claim."), *clarified on other grounds by*, 2013 WL 3508378 (W.D. Wis. May 30, 2013); *see also U.S. Liability Ins. Co. v. Selman*, 70 F.3d 684, 691 (1st Cir. 1995) (explaining that the "usual rule" is to place the burden of proving affirmative defenses on the party asserting them).

B. The *Narragansett* and *Passamaquoddy* Cases

In resolving the questions presented in this case, the Court does not write on a completely blank slate. Although the specific issues as to the Massachusetts Settlement Act have not yet been addressed by any court, similar issues relating to Indian tribes in both Rhode Island, *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1994), and Maine, *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1996), have previously been raised and ruled upon by the First Circuit.

In *Narragansett*, the First Circuit analyzed the interaction between IGRA and the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701-1716 ("Rhode Island Settlement Act"), which codified a land settlement agreement between the state and the Narragansett Indian Tribe. *See* 19 F.3d at 688-89. The Rhode Island Settlement Act provided

that, subject to two exceptions, "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.[7] There, as here, the state initiated a declaratory-judgment action after the Indian tribe (there, the Narragansett) had requested that the state enter into negotiations for a gaming compact. *See* 19 F.3d at 690. Rhode Island contended that IGRA did not apply to the settlement lands held in trust for the tribe and that those lands therefore remained subject to Rhode Island's general criminal and civil laws, including those civil regulations relating to gaming. *See id.* at 691.

After first confirming the validity and applicability of the Rhode Island Settlement Act, the *Narragansett* court set forth an analytical framework for evaluating whether IGRA applies to particular lands. It first quoted language from IGRA stating that it applies only to an "Indian tribe having jurisdiction over Indian lands" (or, as alternatively stated, "Indian lands within such tribe's jurisdiction"). *Id.* at 701 (quoting 25 U.S.C. §§ 2710(d)(3)(A), 2710(b)(1)). It then noted that the term "Indian lands" was defined in IGRA in part as land over which "an Indian tribe exercises governmental power," *id.* (quoting 25 U.S.C. § 2703(4)), and concluded that the statute therefore established "dual limitations" on the eligibility of particular lands. *Id.* In other words, the court held that IGRA applies only to lands over which an Indian tribe both "ha[s] jurisdiction" and "exercise[s] governmental power." *Id.*

The court then proceeded to evaluate whether the settlement lands held in trust for the Narragansetts could meet the "dual limitations" of IGRA. *See id.* at 701-03. In determining whether the Narragansetts had jurisdiction over the land, it focused on whether the Rhode Island Settlement Act had granted exclusive jurisdiction to the state. *See id.* at 701-02 ("[T]he mere

[7] The two exceptions are related to the Tribe's general exemption from state taxation, 25 U.S.C. § 1715(a), and its exemption from state regulations concerning fishing and hunting. 25 U.S.C. § 1706(a)(3). The Massachusetts Settlement Act also contains exceptions related to hunting by means other than firearms or crossbow (but not fishing) and taxation. *See* 25 U.S.C. §§ 1771c(a)(1)(B), 1771e(d).

fact that the Settlement Act cedes power to the state does not necessarily mean, as Rhode Island suggests, that the Tribe lacks similar power and, thus, lacks 'jurisdiction' over the settlement lands."). After concluding that the grant of jurisdiction was non-exclusive, the court found that to be sufficient for the Narragansetts to "ma[k]e the necessary threshold showing" and held that the "having jurisdiction" prong was satisfied. *See id.* at 702 ("Since the [Rhode Island] Settlement Act does not unequivocally articulate an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive. The Narragansetts, therefore, have made the necessary threshold showing.").[8]

Next, the court addressed whether the Narragansetts exercised sufficient governmental power over their settlement lands to meet the statutory requirement. *See id.* at 702-03. It first noted that "[m]eeting this requirement does not depend upon [a t]ribe's theoretical authority, but upon the presence of concrete manifestations of that authority." *Id.* at 703. It then held that the Narragansetts easily satisfied the requirement because of their "many strides in the direction of self-government." *See id.* It stated:

> [The Tribe] has established a housing authority, recognized as eligible to participate in the Indian programs of the federal Department of Housing and Development. It has obtained status as the functional equivalent of a state for purposes of the Clean Water Act, after having been deemed by the Environmental Protection Agency as having "a governing body carrying out substantial governmental duties and powers," and as being capable of administering an effective program of water regulation. It has taken considerable advantage of the

[8] In reaching its conclusion that the grant of jurisdiction by the Rhode Island Settlement Act was non-exclusive, the court cited to language from the Massachusetts Settlement Act and from the Maine Indian Claims Settlement Act of 1980 that limited tribal jurisdiction. *See* 19 F.3d at 702 (citing 25 U.S.C. § 1771e(a) ("The Wampanoag Tribal Council of Gay Head, Inc., shall not have jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal Laws.") and 25 U.S.C. § 1725(f) ("The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.")).

The court stated: "By placing stated limits on the retained jurisdiction of the affected tribes, these newer acts imply that an unadorned grant of jurisdiction to a state—such as is embodied in the [Rhode Island] Settlement Act—does not in and of itself imply exclusivity." 19 F.3d at 702.

> Indian Self-Determination and Education Assistance Act (ISDA), a statute specifically designed to help build "strong and stable tribal governments." The Tribe administers health care programs under an ISDA pact with the Indian Health Service, and, under ISDA contracts with the Bureau, administers programs encompassing job training, education, community services, social services, real estate protection, conservation, public safety, and the like. These activities adequately evince that the Tribe exercises more than enough governmental power to satisfy the second prong of the statutory test.

Id. (citations omitted).

After concluding that IGRA applied to the settlement lands held in trust for the Narragansett, the court endeavored "to determine how [IGRA] and the [Rhode Island] Settlement Act operate in tandem." *Id.* It first clarified that "[t]he proper mode of analysis for cases that involve a perceived conflict between two federal statutes is that of implied repeal," rather than preemption (which applies to conflicts between federal statutes and state or local provisions). *Id.* After reciting the basic principles of the implied-repeal doctrine (including that "implied repeals of federal statutes are disfavored"), the court held that it was "evident that the [Rhode Island] Settlement Act and [IGRA] are partially but not wholly repugnant." *Id.* at 704. It explained:

> The [Rhode Island] Settlement Act assigned the state a number of rights. Among those rights . . . was the non-exclusive right to exercise jurisdiction . . . over the settlement lands. [IGRA] leaves undisturbed the key elements of the compromise embodied in the [Rhode Island] Settlement Act. It also leaves largely intact the grant of jurisdiction—*but it demands an adjustment of that portion of jurisdiction touching on gaming*.

Id. (emphasis added).

The court further held that IGRA "trump[ed]" the Rhode Island Settlement Act for two reasons—first, because it was enacted later in time, and second, because "in keeping with the spirit of the standards governing implied repeals, courts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent." *Id.* Applying that second principle, the court stated:

> Here, reading the two statutes to restrict state jurisdiction over gaming honors [IGRA] and, at the same time, leaves the heart of the [Rhode Island] Settlement Act untouched. Taking the opposite tack—reading the two statutes in such a way as to defeat tribal jurisdiction—would honor the [Rhode Island] Settlement Act, but would do great violence to the essential structure and purpose of [IGRA]. Because the former course keeps disruption of congressional intent to a bare minimum, that reading is to be preferred.

Id. at 704-05.

In sum, the *Narragansett* court held both that IGRA applied to the Narragansett settlement lands and that it impliedly repealed the Rhode Island Settlement Act. *See id.* at 702-03, 705.

Two years later, the First Circuit reached a different conclusion when considering the interplay between IGRA and the Maine Indian Claims Settlement Act of 1980. *Passamaquoddy*, 75 F.3d at 787. In so doing, it did not overrule or question the validity of *Narragansett*. *See id.* at 791 ("Our opinion in *Narragansett Indian Tribe* is not to the contrary."). Instead, the *Passamaquoddy* court based its holding on a "savings clause" in the Maine Settlement Act that expressly restricted the applicability to Maine of future statutes that applied to Indians. *See id.* at 789-91. That clause states:

> The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

25 U.S.C. § 1735(b). Finding that IGRA was a statute enacted "for the benefit of Indians" and that it was not "specifically made applicable within the State of Maine," the court held that the savings clause prevented IGRA from impliedly repealing the Maine Settlement Act. *Passamaquoddy*, 75 F.3d at 791.

Subsequent to *Passamaquoddy*, and approximately two and a half years after *Narragansett*, Congress amended the Rhode Island Settlement Act. Among other changes, it added the following language: "For purposes of [IGRA], settlement lands shall not be treated as Indian lands." *See* Pub. L. No. 104-208, § 330, 110 Stat. 3009-227 (1996). Thus, IGRA no longer applies to the Narragansett settlement lands, and Rhode Island retains civil regulatory jurisdiction over gaming on the tribe's land.

C. Whether IGRA Applies to the Settlement Lands

The first question to be resolved is whether IGRA applies to the Settlement Lands. As set forth by the *Narragansett* court, that question may only be answered in the affirmative if the Tribe meets the "dual limitations" of "having jurisdiction" over the lands and "exercis[ing] governmental power" over them. 19 F.3d at 701.

1. "Having Jurisdiction"

In *Narragansett*, the First Circuit indicated that the "necessary threshold showing" with respect to the first prong is relatively low. *See* 19 F.3d at 702. The court held that the Narragansett Tribe satisfied the requirement simply because the Rhode Island Settlement Act did not grant exclusive jurisdiction to the state of Rhode Island—that which was not granted, the court reasoned, was retained by the Narragansetts. *See id.* ("Since the [Rhode Island] Settlement Act does not unequivocally articulate an intent to deprive the [Narragansett] Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive. The Narragansetts, therefore, have made the necessary threshold showing.").

Here, it is undisputed that the Massachusetts Settlement Act did not grant exclusive jurisdiction to the Commonwealth and the Town; the parties have stipulated that "[t]he Commonwealth, the Town, and the Tribe have each exercised jurisdiction over the Settlement

Lands pursuant to the provisions of the [Massachusetts Settlement] Act." (SMF ¶ 22). Although the Massachusetts Settlement Act contains language limiting the Tribe's jurisdiction to some degree, *see* 25 U.S.C. § 1771e (providing that the Tribe "shall not have any jurisdiction over nontribal members" and mandating that its jurisdiction shall not contravene "the civil regulatory and criminal laws" of the Commonwealth, the Town, and the United States), such language simply confirms that the Tribe retains *some* jurisdiction. Therefore, because the Massachusetts Settlement Act "does not unequivocally articulate an intent to deprive" the Tribe of jurisdiction, *Narragansett*, 19 F.3d at 702, its grant of jurisdiction to the Commonwealth is non-exclusive. That non-exclusive grant of jurisdiction was sufficient to satisfy the "having jurisdiction" prong in *Narragansett*, and so too it is here.

The AGHCA contends that the "having jurisdiction" prong turns "not on whether the Commonwealth and the Town have exclusive jurisdiction over the lands," but on whether "the Tribe has sufficient (and substantial) jurisdiction over th[e] lands" after considering any diminution or defeasance of its jurisdiction. (AGHCA Mem. Opp. 3-4). That reading of the "having jurisdiction" prong, however, seems to run counter to the First Circuit's language suggesting that *any* level of tribal jurisdiction is sufficient. Indeed, the *Narragansett* court concluded the relevant section of its opinion as follows: "[W]e hold that [the Settlement Act's] grant of jurisdiction to the state is *non-exclusive*. The Narragansetts, *therefore*, have made the necessary threshold showing." 19 F.3d at 702 (emphasis added).

Here, it is undisputed that the Massachusetts Settlement Act's grant of jurisdiction to the Commonwealth is non-exclusive and that the Tribe exercises at least some level of jurisdiction over the Settlement Lands. Accordingly, the Tribe satisfies the "having jurisdiction" prong of IGRA.

2. "Exercising Governmental Power"

The second question is whether the Tribe exercises sufficient "governmental power" over the Settlement lands. The term is undefined in IGRA and "[t]he case law considering this phrase is sparse." *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998). Therefore, for guidance, the Court must look to not only other courts' relatively limited explanations of "governmental power," but also to the statutory purpose of IGRA.

In *Narragansett*, the First Circuit explained that whether the Tribe exercises sufficient governmental power over the Settlement Lands "does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." 19 F.3d at 703. Without explaining fully what constitutes sufficient "concrete manifestations" of authority under IGRA, the *Narragansett* court found myriad examples of such manifestations, including the Narragansetts' establishment of a housing authority; the fact that they had "obtained status as the functional equivalent of a state for purposes of the Clean Water Act;" and their administration of programs providing "health care . . ., job training, education, community services, social services, real estate protection, conservation, public safety, and the like." *See id.*

The only other court to construe the phrase "exercising governmental power" looked to the following factors:

> (1) whether the areas are developed; (2) whether tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the Tribe or the State; and (5) other indicia as to who exercises governmental power over those areas.

Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, 528 (D.S.D. 1993), *aff'd*, 3 F.3d 273 (8th Cir. 1993). In that case, however, the court merely noted that there was "nothing in the record to determine" the issue, and denied summary judgment to both parties. *Id.*

The Tribe contends that its governmental authority over the Settlement Lands "is robust and extensive, far in excess of the *minimal threshold*." (Defs.' Mem. 12) (emphasis added). The Tribe asserts that it is "responsible for" providing a full range of governmental services for tribal members, including education, health and recreation, public safety and law enforcement, public utilities, and community assistance. (Vanderhoop Decl. ¶ 3). The Tribe also points to several laws that it has enacted and implemented, including ordinances concerning "building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, enrollment, elections, judiciary, criminal background checks, and reporting of child abuse and neglect." (Defs.' Mem. 12; Vanderhoop Decl. ¶¶ 4-14). Finally, the Tribe contends that it has exercised governmental authority over the Settlement Lands by executing various inter-governmental agreements, including agreements with the Environmental Protection Agency, the National Park Service, and the Bureau of Indian Affairs. (Defs.' Mem. 12; Vanderhoop Decl. ¶¶ 15-21).

The underlying premise of the Tribe's argument appears to be that it need overcome only a "minimal threshold" to show that it exercises governmental power. That premise, however, does not accurately reflect the relevant legal standard. Under the plain language of *Narragansett*, the Tribe does not face a "minimal threshold;" rather, it has the burden of demonstrating "concrete manifestations" of its governmental authority. 19 F.3d at 703. Mere assertions of power or "theoretical authority" over the Settlement Lands are not sufficient. *Id.*

Furthermore, the Tribe's premise is inconsistent with the statutory construction of IGRA. If the Tribe's premise were true, the "governmental power" prong would effectively add no meaning to IGRA beyond the "having jurisdiction" prong, which itself imposed only a minimal threshold. But, as the *Narragansett* court noted, IGRA places "dual limitations" on its "key

provisions" so that they apply only where "Indian Tribes" have "jurisdiction" over "Indian lands." *Id.* at 700-01. In short, the Tribe's interpretation of its burden under the "exercising governmental power" prong violates the surplusage canon of statutory construction: if possible, every word and every provision of a statute is to be given effect, and none should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

Finally, the premise overlooks the clear statutory purpose of IGRA. IGRA was born out of *Cabazon Band*, which "led to an explosion in unregulated gaming on Indian reservations," *Ysleta del Sur Pueblo*, 36 F.3d at 1330, and a "fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements." S. Rep. No. 100-446, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071. To deal with the proliferation of unregulated Indian gaming, Congress passed IGRA to install a regulatory framework, under which (depending on the class of gaming) either a state or tribe, or both, would exercise governmental authority that would be sufficient to manage the inherent challenges posed by gaming facilities. Indian gaming facilities, by their nature, attract persons who would not otherwise travel to reservations or settlement lands. And gaming facilities of any kind have always proved to be an attraction for organized crime. IGRA requires that some governmental authority, whether it be a tribe, a state, or a municipality, provide the law enforcement, public safety, and emergency services that are necessary to serve an influx in traffic and activity and to guard against criminal infiltration and corruption. Where a tribe can initiate gaming without prior state approval (that is, where a federal law does not specifically prohibit it), the tribe must demonstrate, through

existing "concrete manifestations" of governmental power, *Narragansett*, 19 F.3d at 703, that it is prepared to provide at least some substantial portion of those services itself.

Accordingly, the Tribe must make a showing of "concrete manifestations" of its governmental authority over the Settlement Lands to trigger the application of IGRA. Under that standard, the Tribe has failed to carry its burden for at least two reasons.

First, it appears to be undisputed that the Town, and not the Tribe, provides the basic law enforcement and public safety services that are indicative of governmental authority. *See id.* at 703 (noting that the Tribe "administer[ed] programs encompassing . . . public safety"); *see also Cheyenne River Sioux*, 830 F. Supp. at 528 ("whether law enforcement on the lands in question is provided by the Tribe or the State" is an important factor in the governmental power analysis). The Town, not the Tribe, provides the essential police,[9] fire,[10] and emergency services[11] on the Settlement Lands. The Tribe does not have its own "full-fledged police department." (*See* Vanderhoop Dep. 175:9-15). Furthermore, the only two law enforcement officers that the Tribe does employ—both conservation rangers—cannot enforce Commonwealth or Town laws without deputization by a non-tribal authority.[12] (*See* Vanderhoop Dep. 206:3-5; 206:20-207:16; 207:23-208:13; 209:8-210:7). Without deputization, the rangers may not arrest non-tribal

[9] *See* Vanderhoop Dep. 31:25-32:10 ("[P]olice, fire, [and] EMS services are provided from [the Town.]"); *id.* at 212:19-213:24 (Town police patrol the Settlement Lands, make traffic stops on the Settlement Lands, and have made arrests on the Settlement Lands); *id.* at 213:25-214:8, 214:25-215:3 (Tribe Chairman receives a report every few weeks detailing law enforcement incidents on the Settlement Lands); *id.* at 203:9-13 (Town police have primary responsibility in an emergency).

[10] *See id.* at 203:16-19 (Town has responsibility for fire duties on the Settlement Lands); *id.* at 215:11-13 (Tribe does not have a fire department).

[11] *See id.* at 203:20-23 (Tribe has no ambulance service; Tri-Town Ambulance, a consortium of the towns of Aquinnah, Chilmark, and West Tisbury, provides emergency services).

[12] When the conservation rangers are deputized by a non-tribal authority, they are necessarily acting as agents of another sovereign.

members for violations of law, even if those violations occur on the Settlement Lands. *See* 25 U.S.C. § 1771e(a) (Tribe has no jurisdiction over non-tribal members). In short, the Tribe has not met its burden of demonstrating "concrete manifestations" of its governmental power through law enforcement and public safety services. Instead, it appears that the Town exercises governmental power over the Settlement Lands by providing those services.[13]

Second, although the Tribe asserts that it is "responsible for" many other governmental services unrelated to law enforcement and public safety, it does not provide concrete examples of what the Tribe actually does. *See Narragansett*, 19 F.3d at 703; *see also Cheyenne River Sioux*, 830 F. Supp. at 528 ("whether any governmental services are provided and by whom" is an important factor in the governmental power analysis). For example, the First Circuit noted that the Narragansetts "administer[ed]" programs for health care, job training, education, community services, social services, real estate protection, conservation, and public safety. *See* 19 F.3d at 703. The court's analysis suggests that the Narragansetts, in administering those programs, actively managed, directed, and provided services to its members.

---

[13] The Tribe asserts that its passage of ordinances and execution of agreements with other organizations (attached as exhibits to the Vanderhoop Declaration) are sufficient to demonstrate that it exercises governmental authority over the Settlement Lands. But the mere *passage* of ordinances in and of itself does not establish that the Tribe actually exercises governmental power over the lands. Among other things, there is no evidence in the record of any actual tribal enforcement actions.

Moreover, as the AGHCA notes, many of the ordinances and agreements are either no longer in force or do not apply to the lands at issue. Thus, those regulations are only barely relevant, if at all, to the issue of whether the Tribe presently exercises governmental authority over the land. *See* Vanderhoop Dep. 104:15-17 (not all ordinances presently in effect); *id.* at 108:11-24 (ordinance on building, health, fire, and safety "on the books" but "there is no force and effect behind [the] ordinance"); *id.* at 133:7-18, 134:17-19 (program under Exhibit E "not a funded program any longer"; no action taken in 10 years); *id.* at 194:8-12 ("intergovernmental agreement" with town terminated and no longer in effect); *id.* at 163:3-10 (aspects of tribal judiciary have "not been fully implemented"); *id.* at 191:9-14 ("intergovernmental agreement" with Commonwealth regarding Indian child welfare "dissolved" "[b]y the Tribe"); *see also* Dkt. 119-10 (Exhibit I relates to background checks, with no reference to Settlement Lands); Dkt. 119-11 (Exhibit J relates to child abuse reporting, with no reference to Settlement Lands); Dkt. 119-12 (Exhibit K is agreement not specifically tied to Settlement Lands); Vanderhoop Dep. 122:14-25 (Exhibit D not limited to specific Settlement Lands); *id.* at 140:2-5, 141:21-142:2, 143:6-8, 143:18-21, 144:3-7 (tribal enrollment under Exhibit F does not require residency on particular lands or refer to the Settlement Lands).

Here, although the Tribe asserts that it is "responsible for" providing similar services, it provides little evidence of actually providing those services. *See id.* at 703 (noting that assertions of "theoretical authority" are not sufficient). The Tribe has no health board or health inspector.[14] And while the Tribe contends that it is responsible for providing health services on the Settlement Lands, its health clinic is staffed by only one part-time nurse and a doctor who visits only a few times a year.[15] The Tribe does not have a public school.[16] Nor does the Tribe provide any public housing beyond that which is funded by the U.S. Department of Housing and Urban Development.[17] There is no tribal criminal code, prosecutor, or jail.[18] The Tribe's judiciary, which was organized two years ago, offers only a limited judicial function. Its cases are heard by a judge who is hired on a case-by-case basis and who presides by teleconference from Washington State over proceedings that are conducted in a building off the Settlement Lands.[19] And, importantly, the Tribe has no tax system in place on the lands to fund any future governmental services.[20]

In short, the Tribe's demonstrations of governmental authority fall short of establishing sufficient *actual* manifestations of that authority. The analysis, of course, does not consider whether the Tribe *could* effectively exercise substantial governmental authority should the circumstances so require. Rather, the Court's duty is to determine whether the Tribe has met its

---

[14] *See* Vanderhoop Dep. 223:15-19.

[15] *See id.* at 224:18-22; 225:19-226:6; 229:14-230:4.

[16] *See id.* at 227:22-228:25.

[17] *See id.* at 126:14-16.

[18] *See id.* at 244:24-245:15.

[19] *See id.* at 150:4-12; 150:16-17; 150:22-23; 151:13-15; 154:10-20; 155:20-156:4; 156:14-21; 164:14-17.

[20] *See id.* at 258:9-14.

burden of demonstrating that there are currently sufficient concrete manifestations of governmental authority over the Settlement Lands. On this record, the Court must conclude that it has not met that burden, and IGRA therefore does not apply to the Settlement Lands.

D. Whether IGRA Impliedly Repealed the Massachusetts Settlement Act

Although not technically necessary, the Court will proceed to the second step of the *Narragansett* analysis. In determining the effect of IGRA on the Settlement Act, the clear starting point is a comparison of the facts of this case with those of *Narragansett*.

The Commonwealth and the intervenors principally point to the difference in language between the portions of the Massachusetts Settlement Act and the Rhode Island Settlement Act that address applicability of state law.[21] Where the Rhode Island Settlement Act states simply that the settlement lands addressed therein will "be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island," the Massachusetts Settlement Act recites similar language and then adds, "(including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance)." *Compare* 25 U.S.C. § 1708, *with* 25 U.S.C. § 1771g. They contend that the inclusion of gaming-specific language in the Massachusetts Settlement Act triggers an exemption provision of IGRA that was not addressed by the *Narragansett* court. Within the congressional findings section of the statute, subsection (5) reads: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming activity is not specifically prohibited by Federal law* . . . ." 25 U.S.C. § 2701 (emphasis added). According to them, the Massachusetts Settlement Act, by virtue of the parenthetical, is a specific federal prohibition on gaming by the Tribe that triggers the IGRA exemption.

[21] The Commonwealth, the AGHCA, and the Town have each expressly incorporated the arguments made by the others in support of summary judgment against the Tribe. For the sake of simplicity, the Court will refer only to the party who has explicitly raised an argument when addressing it.

The Commonwealth further contends that the statutory histories of IGRA and the Massachusetts Settlement Act demonstrate that Congress did not intend an implied repeal of the Settlement Agreement. It notes that the Massachusetts Settlement Act was enacted by the very same Congress that was already considering a draft version of IGRA and that would ultimately enact IGRA only fourteen months later. It contends that the 100th Congress deliberately included gaming-specific language in the Massachusetts Settlement Act in an effort to prevent it from being impliedly repealed by the imminent Indian gaming statute. Further, it cites to the later congressional amendment to the Rhode Island Settlement Act—legislatively overruling *Narragansett* and specifying that the Narragansett settlement lands were not to be treated as Indian lands—as further evidence that Congress did not intend IGRA "to supersede state-specific Indian land claims settlement acts." (Commonwealth Mem. 9).

The narrow issue before the Court, whether IGRA impliedly repealed the Massachusetts Settlement Act, is essentially one of statutory construction and interpretation. "The chief objective of statutory interpretation is to give effect to the legislative will." *Passamaquoddy*, 75 F.3d at 788. To determine whether it was the legislative will of the 100th Congress for IGRA to impliedly repeal the Massachusetts Settlement Act, the Court must focus principally on the plain language of IGRA and the Massachusetts Settlement Act, and whether the two statutes conflict. *See Narragansett*, 19 F.3d at 699 ("In the game of statutory interpretation statutory language is the ultimate trump card."). If the plain meaning of IGRA and the Massachusetts Settlement Act enables both statutes to be given full effect, the Court cannot read an implied repeal into IGRA. To the extent appropriate, the Court will also look to well-established canons of statutory interpretation and, to a limited extent, legislative history.

1. Plain Meaning: Whether the Massachusetts Settlement Act Is a Federal Law That Prohibits Gaming

As the *Narragansett* court noted, "[i]n the absence of a contrary legislative command, when two acts of Congress touch upon the same subject matter the courts should give effect to both, if that is feasible." 19 F.3d at 703 (citing *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972)). Therefore, "so long as the two statutes, fairly construed, are *capable* of coexistence, courts should regard each as effective." *Id.* (emphasis added); *see also POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."); *Traynor v. Turnage*, 485 U.S. 535, 548 (1988) ("[C]ourts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 51 (1st Cir. 2003) ("Given our reluctance to find an implied repeal, if we can reasonably read the two statutes consonantly, we will.").

In 1988, the 100th Congress enacted IGRA. Two separate provisions of IGRA explicitly state that its provisions are limited by existing federal laws on gaming. First, within the congressional findings section of the statute, subsection (5) reads: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming activity is not specifically prohibited by Federal law* . . . ." 25 U.S.C. § 2701 (emphasis added). Second, within the section of the statute that details jurisdiction for class II gaming, subsection (b)(1) reads:

An Indian tribe may engage in, or license and regulate, class II gaming on Indian

> lands within such tribe's jurisdiction, if—such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (*and such gaming is not otherwise specifically prohibited on Indian lands by Federal law*) . . . .

Id. at § 2710(b)(1) (emphasis added); *see also Ysleta del Sur Pueblo*, 36 F.3d at 1335 ("Congress . . . explicitly stated in two separate provisions of IGRA that [it] should be considered in light of other federal law.").

Therefore, the key issue is whether the Massachusetts Settlement Agreement is a federal law that specifically prohibits the Tribe from initiating gaming activities on the Settlement Lands. Based on the statute's plain meaning, the Court concludes that it is. A year before the 100th Congress enacted IGRA, the same Congress codified the Settlement Agreement into federal law by passing the Massachusetts Settlement Act. It reads: "[T]he settlement lands . . . shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which *prohibit or regulate the conduct of bingo or any other game of chance*)." 25 U.S.C. § 1771g (emphasis added). That parenthetical is critical.[22] It singlehandedly takes a law that, like the Rhode Island Settlement Act in *Narragansett*, is otherwise a general grant of jurisdiction, and transforms it into a law that specifically prohibits gaming on the Settlement Lands. By its plain meaning, the Massachusetts Settlement Act is a federal law that specifically prohibits gaming on the Settlement Lands. It therefore triggers IGRA's exemption in 25 U.S.C. § 2710(b)(1), which allows class II gaming on Indian Lands

[22] Indeed, as the District of Columbia Circuit emphasized in a follow-up case to *Narragansett*, the Massachusetts Settlement Act is different from other legislation, such as the Rhode Island Settlement Act, because it "specifically provide[s] for exclusive state control over gambling." *Narragansett Indian Tribe v. National Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) (citing 25 U.S.C. § 1771g).

within a tribe's jurisdiction as long as "such gaming is not otherwise specifically prohibited on Indian lands by Federal law."

If IGRA and the Massachusetts Settlement Act are "capable of co-existence," the Court must "regard each as effective" unless there is explicit Congressional guidance otherwise. *See Traynor*, 485 U.S. at 548. The two statutes are not merely capable of co-existence; rather, both can be given full effect. IGRA permits tribes to engage in class II gaming on their land *unless* it is specifically prohibited by federal law. 25 U.S.C. § 2710(b)(1). When Congress passed IGRA, the Settlement Act was an existing federal law that specifically prohibited gaming on the Settlement Lands. 25 U.S.C. § 1771g. The statutes are "capable of co-existence" because the Settlement Act's parenthetical triggers IGRA's exemption. Therefore, the Court can, and must, "regard each as effective."

The Tribe, relying on *Narragansett*, contends that if IGRA and the Massachusetts Settlement Act "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." 19 F.3d at 703. Because IGRA and the Massachusetts Settlement Act "cannot be read in harmony and are therefore repugnant," according to the Tribe, "the same [*Narragansett*] analysis leads to the same result when attempting to apply the Federal Act at issue here, with IGRA." (Defs.' Mem. 17).[23]

[23] The Tribe also attempts to bolster its argument that IGRA repealed the Massachusetts Settlement Act by pointing to two supportive agency letters from the Department of the Interior and the National Indian Gaming Commission. The Tribe contends that those letters are entitled to deference. (Defs.' Mem. 20-23). But the Tribe is wrong for at least two reasons. First, the letters are only advisory opinions on legal issues, not final agency action that carry the "force of law." *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Therefore, they are not entitled to deference. *See id.; see also Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013) (noting that informal agency opinion letters are not entitled to deference). Second, the letters focus predominantly on interpreting *Narragansett* and applying its two-step test to the Massachusetts Settlement Act. The First Circuit addressed a similar situation in *Passamaquoddy*, and concluded that "deference is inappropriate when an agency's conclusion rests predominantly upon its reading of judicial decisions" because "courts, not agencies, have special expertise in interpreting case law." 75 F.3d at 794. Accordingly, the Court will not give any deference to the agencies' conclusions.

But the Court's conclusion is not at odds with *Narragansett*. Unlike the Massachusetts Settlement Act, the Rhode Island Settlement Act at issue in *Narragansett* did not contain any specific language about gaming; therefore, it did not specifically prohibit gaming on the tribe's land. *See* Pub. L. No. 95-395, § 9 (Sept. 30, 1978) (codified at 25 U.S.C. § 1708). Accordingly, the Rhode Island Settlement Act did not trigger IGRA's exemption to its coverage. The *Narragansett* Court was correct to conclude that the Rhode Island Settlement Act and IGRA conflicted: the Settlement Act granted Rhode Island the right to exercise jurisdiction over the settlement lands, while IGRA granted the tribe exclusive jurisdiction to regulate class I and class II gaming on the Settlement Lands.

Here, there is no such conflict. The two statutes are not in "irreconcilable conflict;" rather, they both are capable of being given full effect, and the "disfavored" remedy of implied repeal is unnecessary. *See Narragansett*, 19 F.3d at 703-04. It would "show disregard for the congressional design to hold that Congress nonetheless intended [IGRA] to preclude the operation of the [Massachusetts Settlement Act]." *See POM Wonderful*, 134 S. Ct. at 2238.

The Court need not proceed any further in its statutory interpretation because its conclusion is based on the plain meaning of the two statutes. *See, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (citations omitted)). Nonetheless, various well-established canons of construction and relevant legislative history reinforce the conclusion that Congress did not intend to repeal the Massachusetts Settlement Act by enacting IGRA.

2. Congressional Intent: Canons of Construction

"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ." *Connecticut Nat'l Bank*, 503 U.S. at 253. Although they should not be used to escape plain statutory meaning, canons of construction can be useful in deciphering legislative intent. *See Finley v. United States*, 490 U.S. 545, 556 (1989) (expressing the view "that Congress [should] be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts").

The Tribe contends that a canon of construction applicable to Indian law should control the present case. That canon provides that ambiguous statutes concerning Indian tribes should be construed to the tribes' benefit. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citations omitted)); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. . . . The Court has applied similar canons of construction in nontreaty matters." (citations omitted)).

That canon, however, is not applicable here; the statutes in question are not ambiguous. *See Passamaquoddy*, 75 F.3d at 793 ("When, as now, Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning, without any judicial embroidery. . . . [S]ince there is no statutory ambiguity, the principle of preferential construction is not triggered.") Furthermore, and in any

event, there are at least two additional canons of construction that must be considered when interpreting the statute.

The first canon is the strong presumption against implied repeals. *See Passamaquoddy*, 75 F.3d at 790 ("We are unequivocally committed to 'the bedrock principle that implied repeals of federal statutes are disfavored.'" (quoting *Narragansett*, 19 F.3d at 703)). That canon is based on the well-established assumption that "Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *see also Passamaquoddy*, 75 F.3d at 789 ("[C]ourts must recognize that Congress does not legislate in a vacuum" and "take into account the tacit assumptions that underlie a legislative enactment, including . . . preexisting statutory provisions.").

Implied repeals may occur in either of two very limited circumstances: "(1) [w]here provisions in the two acts are in irreconcilable conflict . . . ; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute . . . ." *Posadas v. National City Bank of N.Y.*, 296 U.S. 497, 503 (1936). Unless the statutes fall under one of those circumstances, courts must apply the presumption against reading an implied repeal into the second statute. *See id.* The presumption against implied repeals is even stronger when the two laws are passed during the same legislative session. *See Traynor*, 485 U.S. at 547 (rejecting an implied repeal where "the same Congress" had "not affirmatively evince[d] any intent to repeal or amend" the original statute, and enacted a second statute only one year later); *see also Washington Cnty. v. Gunther*, 452 U.S. 161, 188 (1981) ("It defies common sense to believe that the same Congress . . . intended *sub silentio* . . . to abandon the limitations of the equal work approach just one year later, when it enacted Title VII." (Rehnquist, J., dissenting)); *Pullen v.*

Morgenthau, 73 F.2d 281, 283 (2d Cir. 1934) ("Where both laws are passed at the same session, the presumption against implied repeal is all the stronger.").

Here, the two statutes are not in "irreconcilable conflict" because IGRA exempts federal laws that, like the Massachusetts Settlement Act, specifically prohibit gaming on Indian lands. Furthermore, IGRA, which regulates Indian gaming nationally, does not "cover[ ] the whole subject" of the Massachusetts Settlement Act, which codified agreements between the Commonwealth and the Tribe on many issues other than gaming. The presumption against finding an implied repeal accordingly applies. *Posadas*, 296 U.S. at 503. That presumption carries significant weight here, where the two statutes were moving through Congress simultaneously, and the same Congress that enacted the Massachusetts Settlement Act, passed IGRA fourteen months later.[24] Finally, the virtually concurrent enactment of the Massachusetts Settlement Act and IGRA further distinguishes the analysis here from the situation in *Narragansett*, where the Rhode Island settlement act was enacted ten years before IGRA.

The second canon of construction weighing against finding an implied repeal provides that if two statutes conflict, the more specific statute controls. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) ("[W]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, *regardless of the priority of enactment*." (emphasis added) (citation omitted)). Here, the Massachusetts Settlement Act is a more specific law than IGRA. The former addresses gaming by one specifically named Indian tribe in one particular town, while the latter applies to gaming on all tribal lands nationwide. Again, the gaming-specific language of the Massachusetts Settlement Act distinguishes it from the Rhode Island Settlement Act, which had no such language. In *Narragansett*, because that

[24] The Massachusetts Settlement Act was enacted on August 18, 1987. *See* Pub. L. No. 100-95, 101 Stat. 704. IGRA was enacted on October 17, 1988. *See* Pub. L. No. 100-497, 102 Stat. 2467.

gaming-specific language was absent, the Court could not determine which statute was more specific, and instead applied a secondary canon: "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse." 19 F.3d at 704. Here, where the Massachusetts Settlement Act is clearly more specific than IGRA, it must apply "regardless of the priority of enactment." *See Crawford Fitting*, 482 U.S. at 445.

Accordingly, even if the Court could not rely on plain statutory meaning and had to resort to gleaning congressional intent, two canons of statutory construction weigh in favor of the Commonwealth. Absent explicit Congressional intent, the Court should presume IGRA did not repeal the Massachusetts Settlement Act, and because the latter is more specific than the former, the Settlement Act should control.

3. Congressional Intent: Legislative History

The legislative histories of the two statutes strongly suggest that Congress did not intend to repeal the Massachusetts Settlement Act by enacting IGRA. The Court is mindful of the dangers of relying on legislative history, and certainly acknowledges the principle that legislative history should never be used to contradict the plain meaning of a statute, to add provisions that the statute never contained, or to conflate the general purpose of a statute with its actual text.[25] Here, however, the legislative history is entirely consistent with the statutory plain meaning.

On April 9, 1986, while testifying before Congress in support of the Settlement Agreement being codified as federal law, the President of the Wampanoag Tribal Council stated:

> Lastly, Mr. Chairman we are aware of the growing concern in Congress regarding the issue of gaming on reservations. This bill would not permit such activity on Gay Head. Although the private settlement land will be taken into trust the tribe will not exercise the necessary civil regulatory control on those trust lands which

[25] *See, e.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (describing the use of legislative history as "[t]he equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends"); *Connecticut Nat'l Bank*, 503 U.S. at 254 (1992) (criticizing the use of legislative history and citing the plain meaning rule as the "cardinal canon" in statutory interpretation).

> the courts have deemed necessary. We recognize and accept that *no gaming on our lands is now or will in the future be possible*.

Hearing on S. Res. 1452 Before the United States Senate Committee on Indian Affairs (written testimony) (emphasis added). But even at the time of that testimony, drafts of the Massachusetts Settlement Agreement did not yet include a specific prohibition on gaming. (AGHCA Mem. 17).

On February 19, 1987, Senate Bill 555, which would ultimately be enacted as IGRA, was introduced. (*Id.* at Ex. B). Four months later, House Bill 2855, which was ultimately enacted as the Massachusetts Settlement Act, was introduced. (*Id.* at Ex. C). That bill was the first draft of the Massachusetts Settlement Agreement to include gaming-specific language.[26] Therefore, Congress added the gaming-specific parenthetical in the Massachusetts Settlement Act just after the introduction of the bill that became IGRA, which had an exemption for federal laws otherwise specifically prohibiting gaming. Further, the language used in the Settlement Act's gaming prohibition closely tracks the language Congress used in defining class II gaming in IGRA. In IGRA, Congress defined class II gaming as "games of chance commonly known as bingo or lotto," (*id.* at Ex. B § 4(8)) and in the Settlement Act, Congress specified that the Settlement Lands would be subject to the laws, ordinances, and jurisdiction of the Commonwealth and the Town, including those related to "bingo or any other game of chance." (*Id.* at Ex. C § 9).

Congress's addition of a gaming prohibition in the Massachusetts Settlement Act, in the

[26] *Compare id.* at Ex. C § 9 ("Except as otherwise expressly provided in this Act or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance.*)" (emphasis added)), *with id.* at Ex. E § 109 (same, but for absence of "including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance").

same terms used in IGRA, immediately after the introduction of the bill that became IGRA, suggests that its intent was to exempt the Settlement Act from IGRA's broader provisions. Therefore, the legislative history of the two statutes is consistent with the plain meaning of IGRA's exemption and the Settlement Act's parenthetical: the Massachusetts Settlement Act's gaming-specific provision, not IGRA, controls the Tribe's ability to game on the Settlement Lands.

Furthermore, the Court cannot ignore the fact that Congress enacted a statute overruling the decision in *Narragansett*. In 1996, Congress amended the Rhode Island Settlement Act to state that the lands subject to the Act were not "Indian Lands" within IGRA's meaning, thereby ensuring that IGRA would not supersede the settlement. *See* Pub. L. No. 104-208, § 330, 110 Stat. 3009-227 (1996). As the court later noted in *Narragansett II*, "Congress promptly enacted the [ ] [a]mendment to . . . restore[ ] the integrity of the Rhode Island Claims Settlement Act and uph[o]ld the primacy of State jurisdiction over the Tribe's settlement lands." 158 F.3d at 1341 (citations omitted). The legislative overrule of *Narragansett* is further evidence that Congress did not intend IGRA to supersede state-specific Indian land settlements like the Massachusetts Settlement Act.

Accordingly, the Court finds that IGRA did not impliedly repeal the Massachusetts Settlement Act.

IV. Conclusion

In summary, the Tribe has not met its burden of demonstrating that it exercises sufficient "governmental power" over the Settlement Lands, and therefore IGRA does not apply. Furthermore, and in any event, it is clear that IGRA did not repeal by implication the Massachusetts Settlement Act. Accordingly, the Tribe cannot build a gaming facility on the

Settlement Lands without complying with the laws and regulations of the Commonwealth and the Town.

For the foregoing reasons:

1. The motion for summary judgment of the Commonwealth of Massachusetts is GRANTED;
2. The motion for summary judgment of the Town of Aquinnah is GRANTED;
3. The motion for summary judgment of the Aquinnah/Gay Head Community Association, Inc. is GRANTED;
4. The motion for summary judgment of the Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation is DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: November 13, 2015

		VACATED, having been issued by "clerical mistake" within the meaning of the rule. The motion for entry of final judgment (Docket # 155) is GRANTED, subject to certain modifications. A final judgment under Fed. R. Civ. P. 58 shall issue. (Pezzarossi, Lisa) (Entered: 01/05/2016)
01/03/2016	156	MEMORANDUM in Opposition re 155 MOTION Entry of Final Judgment *on Behalf of the Commonwealth of Massachusetts, the Town of Aquinnah, and the Aquinnah/Gay Head Community Association, Inc.* filed by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Attachments: # 1 Exhibit 1−Tribe's Proposed Form−Final Judgment)(Crowell, Scott) (Entered: 01/03/2016)
12/29/2015	155	MOTION Entry of Final Judgment *on Behalf of the Commonwealth of Massachusetts, the Town of Aquinnah, and the Aquinnah/Gay Head Community Association, Inc.* by Aquinnah/Gay Head Community Association, Inc.. (Attachments: # 1 Exhibit A − Proposed Final Judgment)(Ellsworth, Felicia) (Entered: 12/29/2015)
12/28/2015	154	Judge F. Dennis Saylor, IV: ORDER OF DISMISSAL entered. (Pezzarossi, Lisa) (Entered: 12/28/2015)
12/23/2015	153	Judge F. Dennis Saylor, IV: ELECTRONIC ORDER entered. After careful consideration and review, the 152 motion of defendants and counterclaim−plaintiffs for reconsideration is DENIED. (Pezzarossi, Lisa) (Entered: 12/23/2015)
12/11/2015	152	MOTION for Reconsideration re 151 Memorandum & ORDER by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Attachments: # 1 Affidavit Declaration of Scott Crowell, # 2 Exhibit One to Declaration of Scott Crowell, # 3 Exhibit Two to Declaration of Scott Crowell, # 4 Exhibit Three to Declaration of Scott Crowell)(Crowell, Scott) (Entered: 12/11/2015)
11/13/2015	151	Judge F. Dennis Saylor, IV: ORDER entered. Memorandum and Order on Motions for Summary Judgment. (Pezzarossi, Lisa) (Entered: 11/13/2015)
08/18/2015	150	REPLY to Response to 116 MOTION for Summary Judgment , 120 MOTION for Summary Judgment , 112 MOTION for Summary Judgment filed by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Crowell, Scott) (Entered: 08/18/2015)
08/18/2015	149	Judge F. Dennis Saylor, IV: ELECTRONIC ORDER entered granting 146 MOTION for Leave to File Memorandum in Excess of Page Limit for Aquinnah's Reply in Support of Motion for Summary Judgment (Assented to). Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include − Leave to file granted on (date of order)− in the caption of the document. (Pezzarossi, Lisa) (Entered: 08/18/2015)
08/12/2015	148	ELECTRONIC Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Motion Hearing held on 8/12/2015. Case called. Court heard argument on the cross motions for summary judgment. Court took the matter under advisement. (Court Reporter: Valerie OHara at vaohara@gmail.com.)(Attorneys present: Bertran, Benedon, Rice, Crowell, Echo−Hawk, Skinner, Ellsworth, Rappoport) (Pezzarossi, Lisa) (Entered: 08/12/2015)
08/06/2015	147	REPLY to Response to 112 MOTION for Summary Judgment filed by Commonwealth of Massachusetts. (Bertram, Bryan) (Entered: 08/06/2015)
08/06/2015	146	MOTION for Leave to File *Memorandum in Excess of Page Limit for Aquinnah's Reply in Support of Motion for Summary Judgment* by The Aquinnah Wampanoag Gaming Corporation, The Wampanoag Tribal Council of Gay Head, Inc., The Wampanoag Tribe of Gay Head (Aquinnah). (Attachments: # 1 Exhibit Aquinnah's Reply in Support of Motion for Summary Judgment)(Crowell, Scott) (Entered: 08/06/2015)
08/06/2015	145	REPLY to Response to 120 MOTION for Summary Judgment filed by Aquinnah/Gay Head Community Association, Inc.. (Ellsworth, Felicia) (Entered: 08/06/2015)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMMONWEALTH OF MASSACHUSETTS, **Plaintiff/Counterclaim-Defendant,** **and** **THE AQUINNAH/GAY HEAD COMMUNITY ASSOCIATION, INC. (AGHCA) and TOWN OF AQUINNAH,** **Intervenors/Plaintiffs,** **v.** **THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), THE WAMPANOAG TRIBAL COUNCIL OF GAY HEAD, INC., and THE AQUINNAH WAMPANOAG GAMING CORPORATION,** **Defendants/Counterclaim-Plaintiffs,** **v.** **CHARLIE BAKER, in his official capacity as GOVERNOR, COMMONWEALTH OF MASSACHUSETTS, et al.,** **Third-Party Defendants.**	**Civil Action No. 13-13286-FDS**

FINAL JUDGMENT

SAYLOR, J.

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and consistent with the Court's July 1, 2014 Order denying the Commonwealth's motion to remand (Docket No. 31), the Court's February 27, 2015 Order addressing the motions to dismiss (Docket No. 95), the Court's

July 28, 2015 Order entering a preliminary injunction (Docket No. 140), and the Court's November 13, 2015 Order addressing the cross-motions for summary judgment (Docket No. 151), it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. Judgment is hereby entered in favor of plaintiff/counterclaim-defendant the Commonwealth of Massachusetts and intervenor-plaintiffs/counterclaim-defendants the Aquinnah/Gay Head Community Association, Inc. ("AGHCA") and the Town of Aquinnah, and against defendants/counterclaim-plaintiffs the Wampanoag Tribe of Gay Head (Aquinnah), the Wampanoag Tribal Council of Gay Head, Inc., and the Aquinnah Wampanoag Gaming Corporation (collectively, "the Tribe") as to the claims for breach of contract and declaratory judgment brought by the Commonwealth of Massachusetts, the AGHCA, and the Town of Aquinnah.

2. Judgment is hereby entered in favor of the Commonwealth of Massachusetts, the AGHCA, the Town of Aquinnah, and third-party defendants Governor Charlie Baker, Attorney General Maura Healey, and Chairman of the Massachusetts Gaming Commission Stephen Crosby, and against the Tribe, as to the Tribe's counterclaims for a declaratory judgment.

3. Judgment is hereby entered declaring that the Tribe may not construct, license, open, or operate any gaming facility at or on the Settlement Lands (as those lands are defined in the Summary Judgment Order) without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, including any pertinent state and local permitting requirements.

4. A permanent injunction is hereby entered enjoining and restraining the Tribe from commencing or continuing construction of and/or opening any gaming facility at or on the Wampanoag Community Center building site (as that term is used in the Preliminary Injunction Order) or on any other Settlement Lands (as those lands are defined in the Summary Judgment Order), without complying with the laws and regulations of the Commonwealth of Massachusetts and the Town of Aquinnah, including any pertinent state and local permitting requirements.

So Ordered.

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
United States District Judge

Dated: January 5, 2016

October 5, 2015

Governor Hisa
Ysleta del Sur Pueblo
119 S. Old Pueblo Rd.
Ysleta del Sur Pueblo, TX 79907

RE: Ysleta del Sur Pueblo Class II Tribal Gaming Ordinance and Resolution No. TC-021-14.

Dear Governor Hisa:

This letter responds to the Ysleta del Sur Pueblo's August 17, 2015, request through its attorneys, Johnson, Barnhouse & Keegan, to the National Indian Gaming Commission (NIGC) to review and approve the Pueblo's amendments to its Class II gaming ordinance. The amendments to the gaming ordinance were adopted by Resolution No. TC-021-14 by the Ysleta del Sur Pueblo Tribal Council.

Resolution No. TC-021-14 revises the Pueblo's current gaming ordinance to reflect the changes in the NIGC regulations in the last twenty years and to seek NIGC regulation of its bingo operations in light of federal case law.[1] Because the Pueblo's ordinance permits it to conduct gaming on its *Indian lands,*[2] an analysis of whether its lands are eligible for gaming was necessary.

Analysis

The Pueblo asserts in the ordinance that it has the authority to regulate Class II gaming on its *Tribal Lands* under IGRA.[3] It defines *Tribal Lands,* or alternatively *Pueblo Lands,* as all lands within the limits of the Pueblo's *Reservation.*[4] The Pueblo defines *Reservation*[5] as it is defined in the Pueblo's Restoration Act.[6]

---

[1] *Ysleta del Sur Pueblo v. State of Texas,* 36 F.3d 1325 (5th Cir. 1994).
[2] Ysleta Del Sur Pueblo Class II Tribal Gaming Ordinance § 5.
[3] *Id.* § 2.1
[4] *Id.* § 4.31.
[5] *Id.* § 4.37.
[6] 25 U.S.C. § 1300g(3) ("the term 'reservation' means lands within El Paso and Hudspeth Counties, Texas— (A) held by the tribe on August 18, 1987; (B) held in trust by the State or by the Texas Indian Commission for the benefit of the tribe on August 18, 1987; (C) held in trust for the benefit of the tribe by the Secretary under section

As discussed in greater detail below, the *Tribal lands* specified in the ordinance amendment are *Indian lands* as defined by IGRA and are eligible for gaming under the Act. However, the Restoration Act provides a general grant of state jurisdiction over the Pueblo's lands, through Public Law 280,[7] and specifically applies state gaming laws to the Pueblo's lands,[8] with a caveat.[9] Accordingly, the Restoration Act must be taken into consideration as part of this ordinance review.

Further, because the definition in the Pueblo's ordinance incorporates the Restoration Act and the Secretary of the Interior administers tribal restoration acts,[10] the NIGC Office of General Counsel sought the Department of Interior, Office of the Solicitor's opinion as to whether under the Restoration Act the Pueblo can game pursuant to IGRA on its Indian lands; specifically, whether the Pueblo possesses sufficient jurisdiction over its Restoration Act lands for IGRA to apply and if so, how to interpret the interface between IGRA and the Restoration Act.[11]

Jurisdiction

First, we must first examine the scope of IGRA to determine whether it has jurisdiction over the Pueblo's Restoration Act lands or phrased alternatively, whether the Pueblo's Restoration Act lands are exempt from IGRA's domain. In keeping with IGRA's purpose to establish federal standards for gaming on Indian lands and an independent federal regulatory authority for gaming on Indian lands,[12] NIGC has jurisdiction with over gaming on Indian lands.

However, Congress can prohibit tribes from gaming under IGRA by exempting them from IGRA's scope. For instance, Congress explicitly stated IGRA did not apply to the Catawba Indian Tribe of South Carolina when it ratified its settlement agreement with the Catawba.[13] And Congress amended the Narragansett Tribe's settlement act to specifically exclude its settlement

---

1300g–4(g)(2) of this title; and (D) subsequently acquired and held in trust by the Secretary for the benefit of the tribe.").

[7] 25 U.S.C. § 1300g-4(f) ("[Texas] shall exercise civil and criminal jurisdiction within the boundaries of the reservation as if such State had assumed such jurisdiction with the consent of the tribe under sections 1321 and 1322 of this title.").

[8] 25 U.S.C. § 1300g-6(a) ("All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.").

[9] 25 U.S.C. § 1300g-6(b) ("Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.").

[10] *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1994) ("Deference is appropriate under Chevron only when an agency interprets a statute that it administers. Here, the question of the Gaming Act's applicability cannot be addressed in a vacuum, and the [NIGC], whatever else might be its prerogatives, does not administer the Settlement Act. That role belongs to the Secretary of the Interior ….").

[11] May 29, 2015, Letter to Deputy Solicitor, Indian Affairs Venus Prince from NIGC General Counsel, Eric N. Shepard.

[12] 25 U.S.C. § 2702(3) (2012).

[13] 25 U.S.C. § 941l(a).

lands from IGRA,[14] after the First Circuit found IGRA applied.[15] Finally, Congress exempted the Maine tribes – Passamaquoddy, Penobscot, and Maliseet – from all federal Indian legislation enacted after their settlement act, including IGRA, unless Congress makes those laws specifically applicable,[16] which IGRA did not.[17] In contrast to those examples, the Pueblo's Restoration Act does not explicitly prohibit IGRA's authority over the Pueblo. Further, nothing in IGRA's legislative history indicates that the Pueblo is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Pueblo.

Next, the Solicitor's Office concurred with our conclusion that IGRA applies to the Pueblo and further opined the Pueblo possesses sufficient legal jurisdiction over its settlement lands for IGRA to apply, that IGRA governs gaming on the Pueblo's reservation, and IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA.[18] Therefore, the only remaining questions are whether those lands qualify as Indian lands as defined in IGRA and whether they are eligible for gaming.

Indian Lands

IGRA permits an Indian Tribe to "engage in, or license and regulate, gaming on Indian lands with such Tribe's jurisdiction."[19] It defines *Indian lands* as all lands with the limits of any Indian Reservation.[20] In 1987, the Restoration Act established a reservation for the Pueblo,[21] comprised of the Pueblo's land holdings at that time.[22] Because the Pueblo has a reservation – established a year before Congress passed IGRA – the Pueblo has IGRA-defined *Indian lands.* Further, the Pueblo identified in its ordinance that it authorizes gaming on its *Tribal lands* – defined as all lands within the limits of its *Reservation.* The Pueblo's ordinance limits where it can operate a class II gaming facility to its established reservation. Accordingly, the Restoration Act lands qualify as *Indian lands* under IGRA.

Finally, because the Pueblo's Restoration Act, which created the reservation, pre-dates IGRA, an after-acquired land analysis is not necessary.[23]

Conclusion

[14] 25 U.S.C. § 1708(b).
[15] *Rhode Island v. Narragansett,* 19 F.3d 685, 697-700(1st Cir. 1994).
[16] 25 U.S.C. § 1735(b).
[17] *Passamaquoddy Tribe v. State of Me.*, 75 F.3d 784 (1st Cir. 1996).
[18] September 10, 2015, Letter to NIGC General Counsel, Michael Hoenig, from Deputy Solicitor for Indian Affairs, Venus McGhee Prince. (*Attachment A.)*
[19] 25 U.S.C. § 2710(b)(1).
[20] 25 U.S.C. § 2703(4)(A); 25 C.F.R. § 502.12(a): "*Indian lands* means: (a) Land within the limits of an Indian reservation."
[21] 25 U.S.C. § 1300g-4(a)
[22] 25 U.S.C. § 1300g (3).
[23] *See generally* 25 U.S.C. § 2719.

In conclusion, because the Pueblo possesses sufficient legal jurisdiction over its Restoration Act lands, IGRA applies. Further, because the lands qualify as *Indian lands* under IGRA, the lands are eligible for gaming under IGRA.

Thank you for bringing the amended gaming ordinance to our attention. The ordinance is approved, as it is consistent with the requirements of IGRA and NIGC regulations.

If you have any questions, please contact staff attorney Heather Corson at (202) 632-7003.

Sincerely,

Jonodev O. Chaudhuri
Chairman

Enclosure

cc: Randolph H. Barnhouse
Johnson, Barhouse, & Keegan (via email, only: rbarnhouse@indiancountrylaw.com)

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

SEP 10 2015

Michael Hoenig, General Counsel
National Indian Gaming Commission
90 K Street NE, Suite 200
Washington, DC 20002

Re: Ysleta del Sur Pueblo Restoration Act

Dear Mr. Hoenig:

This letter responds to the National Indian Gaming Commission ("NIGC") Office of General Counsel's letter dated May 29, 2015,[1] requesting our opinion regarding whether, in light of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act" or "Act"),[2] and the Indian Gaming Regulatory Act ("IGRA"),[3] the Ysleta del Sur Pueblo ("Tribe" or "Pueblo") can game pursuant to the IGRA on the Tribe's reservation and tribal lands.

Applying the Department's expertise in the field of Indian affairs,[4] this Office concludes that the Restoration Act did not divest the Tribe of jurisdiction over its reservation and tribal lands and, therefore, that the IGRA applies to such lands. In addition, we conclude that the IGRA impliedly repealed Section 107 of the Restoration Act, which concerns gaming.

I. BACKGROUND

In order to answer your question, we must interpret those provisions of the Restoration Act that concern jurisdiction, including jurisdiction over gaming. The Restoration Act was enacted in the midst of a sea change in gaming law; consequently, our analysis also considers the evolution of the Act's gaming provisions, the evolution of gaming law in the State of Texas ("Texas" or "State") between 1987 and 1991, and the enactment approximately one year after the Restoration Act of the IGRA. Finally, we evaluate the Tribe's current request in light of the long-running litigation between the State and the Tribe over the Tribe's attempts to game within the bounds of the Restoration Act.

---

[1] Letter from Eric Shepard, General Counsel, Nat'l Indian Gaming Comm'n, to Venus Prince, Deputy Solicitor – Indian Affairs (May 29, 2015) [hereinafter "2015 NIGC Letter"].

[2] Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 731 *et seq.* (Alabama and Coushatta Indian Tribes of Texas), §§ 1300g *et seq.* (Ysleta del Sur Pueblo)). Title I of the Restoration Act addresses the Pueblo; Title II of the Restoration Act restores the Federal trust relationship with the Alabama and Coushatta Indian Tribes of Texas. *Id.*

[3] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

[4] *See, e.g.*, *Cherokee Nation v. United States*, 73 Fed. Cl. 467, 479 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

Attachment A

A. History of the Ysleta del Sur Pueblo

The Pueblo of Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the Spanish.[5] When the Spanish retreated from Santa Fe, New Mexico, to El Paso, Texas, they forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them.[6] The Indians established a new Pueblo in Texas called Ysleta del Sur and, in 1682, built a church for their community.[7] In 1751, Spain granted to the inhabitants of the Ysleta del Sur Pueblo land measuring one league in all directions from the church doors.[8] However, in 1871, the Texas Legislature enacted a statute incorporating the Town of Ysleta in El Paso County, and subsequent actions by the town resulted in nearly all of the 23,000 acres of the Spanish land grant being patented to non-Indians.[9]

From 1870 through the 1960s, the Tribe "continued to reside in the area and maintain their ethnic identification as well as their basic political system . . . . Also during this time there is a record of increasing interactions between the [Tribe] and both the U.S. Government and the State of Texas."[10] In 1968, Congress passed An Act Relating to the Tiwa Indians of Texas,[11] wherein Congress transferred all Federal trust responsibility for the Pueblo to the State of Texas.[12]

B. The Restoration Act

In the 1980s, the State of Texas concluded that its trust relationship with the Tribe constituted a violation of the Texas Constitution and determined that the State could not continue to provide trust services to the Tribe.[13] In light of this determination, Congress acted to restore the Federal trust relationship with the Tribe and passed the Restoration Act in 1987.[14] Through the Restoration Act, Congress provided that the Tiwa Indians of Ysleta, Texas, would thereafter "be known and designated as the Ysleta del Sur Pueblo,"[15] and "restored" "[t]he Federal trust relationship between the United States and the tribe."[16] In addition, the Restoration Act designated as "a Federal Indian reservation" those lands within El Paso and Hudspeth Counties in Texas that were held by the Tribe on the date of the Act's enactment, held in trust by the State or by the Texas Indian Commission for the benefit of the Tribe, or held in trust by the Secretary for the benefit of the Tribe, as well as subsequently acquired lands acquired and held in trust by

---

[5] S. Rep. No. 100-90, at 6 (1987) (hereinafter, "1987 Senate Report").

[6] *Id.*

[7] 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (statement of Rep. Coleman).

[8] 1987 Senate Report, *supra* note 5, at 6.

[9] *Id.* at 7.

[10] 131 CONG. REC. H12012 (statement of Rep. Coleman).

[11] Pub. L. No. 90-287, 82 Stat. 93 (1968), *repealed by* Restoration Act, *supra* note 2, § 106.

[12] *Id.*

[13] 1987 Senate Report, *supra* note 5, at 7.

[14] Restoration Act, *supra* note 2.

[15] *Id.* at § 102 (codified at 25 U.S.C. § 1300g-1).

[16] *Id.* at § 103(a) (codified at 25 U.S.C. § 1300g-2(a)).

the Secretary for the benefit of the Tribe,[17] and mandated that the Secretary take certain lands into trust for the benefit of the Tribe.[18] Furthermore, at Section 105(f) the Act incorporates Public Law 280,[19] as amended by the Indian Civil Rights Act,[20] by providing that the State has civil and criminal jurisdiction on the Tribe's reservation "as if such State had assumed such jurisdiction with the consent of the tribe under" 25 U.S.C. §§ 1321-1322.[21]

The original version of the Restoration Act, introduced in February 1985, contained no specific references to gaming.[22] However, the time between the bill's introduction and its final passage in 1987 was a period of great uncertainty surrounding Indian gaming.[23] The Act was amended multiple times to address gaming.[24]

---

[17] *Id.* at§ 105(a) (codified at 25 U.S.C. § 1300g-4(a)) (establishing a Federal Indian reservation); at § 101(3) (codified at 25 U.S.C. § 1300g(3)) (defining "reservation").

[18] *Id.* at § 105(b)(1) (codified at 25 U.S.C. § 1300g-4(b)) (requiring that the Secretary (1) accept any offer by the State to convey to the United States land within the Tribe's reservation held in trust, and (2) hold such land in trust for the benefit of the Tribe).

[19] Pub. L. 83-280, 67 Stat. 588 (1953)

[20] Pub. L. 90-284, 82 Stat 77 (1968).

[21] Restoration Act, supra note 2, § 105(f) (codified at 25 U.S.C. § 1300g-4(f)).

[22] H.R. 1344, 99th Cong. (1985).

[23] In February 25, 1986, the Ninth U.S. Circuit Court of Appeals held that the State of California and Riverside County could not enforce their gaming laws on the reservations of the Cabazon and Morongo Bands of Mission Indians. *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (1986). One year later, the U.S. Supreme Court affirmed. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter, "*Cabazon*"]. The Fifth Circuit subsequently observed that the *Cabazon* decision "led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming." *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1330 (5th Cir. 1994) [hereinafter "*Ysleta del Sur*"]; *accord Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015) ("The Court's decision in *Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.").

[24] Following a committee hearing on October 1985, the House passed an amended version of the bill that would have allowed the Tribe to enact a gaming ordinance, but only if that ordinance mirrored the laws of Texas. H. Rep. No. 99-440, at 2-3 (1985) (amendments to H.R. 1344); 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Nonetheless, "various state officials and members of Texas' congressional delegation were still concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation." *Ysleta del Sur*, 36 F.3d at 1327. As a result, the Tribe enacted Resolution No. TC-02-86, which acknowledged the controversy over gaming and asked, in part, that the bill be amended to prohibit "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, . . . on the Tribe's reservation or tribal land." Ysleta del Sur Pueblo Resolution No. TC-02-86, *reprinted in Ysleta del Sur*, 36 F.3d at 1328 n.2.

In accordance with the Tribe's request, the bill was amended again to prohibit "[a]ll gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas . . . on the tribe's reservation and on tribal lands." 131 CONG. REC. S13635 (daily ed. Sept. 24, 1986) (text of H.R. 1344, § 107(a) as passed by the Senate). That version passed the Senate. *Id.* However, the very next day, before it could be reconciled with the House version, the Senate vitiated its passage of the bill, effectively killing any restoration of the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in the 99th Congress. 131 CONG. REC. S13735 (daily ed. Sept. 25, 1986).

A new version of the bill was introduced in January 1987, and subsequently was passed by the House; it, like the earlier Senate bill, would have expressly prohibited all gaming on the Tribe's reservation and tribal lands. 133 CONG. REC. H13735 (daily ed. Apr. 21, 1987). Later that year, the bill was amended again by the Senate, which deleted the express prohibition against gaming. 1987 Senate Report, *supra* note 5, at 3 (text of H.R. 318, § 107(a) as amended by the Senate). The Senate's version of H.R. 318 ultimately was enacted, with the gaming provisions contained in Section 107. *See* Restoration Act, *supra* note 2, § 107.

Attachment A

When the Restoration Act was enacted in 1987, Texas law generally prohibited gaming, with the exception of charitable bingo on a local-option basis.[25] In the Restoration Act, the first sentence of Section 107(a) makes the State's substantive gaming laws applicable on the Tribe's lands. Similarly, the second sentence extends to the Tribe's lands the penalties provided in State law for engaging in prohibited gaming. The final sentence explains, at least in part, why Congress included gaming provisions in the Act. Thus, through Section 107(a), Congress provided for a limited application of State gaming law on the Tribe's lands:

> SEC. 107. GAMING ACTIVITIES
>
> (a) IN GENERAL.–All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the Tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.[26]

Despite the application of Texas law, however, Section 107(b) expressly states that "[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."[27] In other words, the Tribe retained civil and criminal regulatory jurisdiction over its reservation and tribal lands, except to the extent expressly divested by the following subsection of the Act.

Finally, although another section of the Restoration Act generally granted the State "civil and criminal jurisdiction within the boundaries of the reservation,"[28] Section 107(c) expressly provides that federal courts, not state courts, are the forum in which the State may seek to enforce alleged violations of Section 107(a):

> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.–Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.[29]

---

[25] Tex. Const. art. 3, § 47(b)-(c) (as amended 1980). The Texas Constitution provided that "[t]e Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in the State, as well as the sale of tickets in lotteries, gift enterprises, or other evasions involving the lottery principle, established or existing in other States." *Id.* at art. 3, § 47(a). In addition, wagering on dog and horse racing in Texas had been illegal since 1937. Texas Legislative Council, Info. Rep. No. 87-2: Analysis of Proposed Constitutional Amendments and Referenda Appearing on the November 3, 1987, Ballot, at 75 (Sept. 1987).

[26] Restoration Act, *supra* note 2, at § 107(a) (codified at 25 U.S.C. § 1300g-6(a)).

[27] *Id.* at § 107(b) (codified at 25 U.S.C. § 1300g-6(b)).

[28] *Id.* at § 105(f) (codified at 25 U.S.C. § 1300g-4(f)) (granting Texas civil and criminal jurisdiction equivalent to that granted by Public Law 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act, Pub. L. 90-284, 82 Stat 77 (1968).

[29] *Id.* at § 107(c) (codified at 25 U.S.C. § 1300g-6(c)).

C. Gaming in Texas

Almost immediately after the Restoration Act was enacted, Texas began to open itself up to gaming. On November 3, 1987—less than three months after the Restoration Act was enacted—the people of Texas by referendum ratified the Legislature's enactment of the Texas Racing Act, allowing for pari-mutuel dog and horse racing.[30] Two years later, the Texas Constitution was amended to allow for "charitable raffles."[31] A more momentous change occurred in 1991, when the Texas Constitution was amended to permit certain lotteries.[32] Texas now offers a variety of lottery games, including national Powerball and MegaMillions.[33] Thus, while charitable bingo was the only gaming permitted in Texas at the time the Restoration Act was enacted, a little more than four years later the State had dramatically expanded gaming to include raffles, pari-mutuel racing, and a state lottery. In Fiscal Year 2014, Texas Lottery sales totaled almost $4.4 billion, returning more than $1.2 billion to the State's coffers.[34] In addition, races at Texas racetracks generated more than $438 million in wagers during calendar year 2014.[35]

D. The Indian Gaming Regulatory Act

The expansion of State-sanctioned gaming in Texas was not the only change to the legal landscape in the years immediately following enactment of the Restoration Act. On October 19, 1988, a little more than one year after it enacted the Restoration Act, Congress enacted the IGRA. Among the IGRA's stated purposes were to establish a new nationwide regulatory framework for tribal gaming on Indian lands within a tribe's jurisdiction,[36] and to promote "tribal economic development, self-sufficiency, and strong tribal governments."[37]

---

[30] The Texas Racing Act ("Racing Act") was enacted by the Texas Legislature in 1986. *Id.* However, the Racing Act provided that wagering could be conducted pursuant to its provisions only after it was ratified by the State's voters. *Id.* On November 3, 1987, the voters in Texas approved the Racing Act by a wide margin. Bill Christine, *Texas Voters Finally End a 50-year Ban Against Betting on Horse Races*, L.A. TIMES, Nov. 5, 1987, *available at* http://articles.latimes.com/1987-11-05/sports/sp-18911_1_horse-racing-notes (last visited July 9, 2015).

[31] Tex. Const. art. 3, § 47(d) (as amended 1989).

[32] Tex. Const. art. 3, § 47(3) (as amended 1991).

[33] *See* Texas Lottery, *Play the Games of Texas*, http://www.txlottery.org/export/sites/lottery/Games/index.html (last viewed July 9, 2015).

[34] Texas Lottery Commission, *Summary of Financial Information* (undated; audited through FY2014, unaudited through March 2015), *available at* http://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited July 9, 2015).

[35] Texas Racing Commission, *Texas Pari-Mutuel Racetracks Wagering Statistics Comparison Report on Total Wagers Placed in Texas & on Texas Races For the Period: 01/01/13 – 12/31/13 to 01/01/14 – 12/31/14* at 1 (undated), *available at* http://www.txrc.texas.gov/agency/data/wagerstats/prevYr/20141231.pdf (last visited July 9, 2015).

[36] *See* 25 U.S.C. §§ 2701-2702 (Congress's findings and declaration of policy), § 2710 (governing tribal gaming ordinances); S. Rep. No. 100-446, at 6 (1988) [hereinafter "1988 Senate IGRA Report"] (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"); *see also Wells Fargo Bank v. Lake of the Torches*, 658 F.3d 684, 687 (7th Cir. 2011) (finding that among the IGRA's "stated goals was "to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes'" (quoting 25 U.S.C. § 2702(1)). *Cf. Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) [hereinafter "*Narragansett*"] ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.")

[37] 25 U.S.C. § 2702(1).

The vast majority of tribal gaming in the United States is governed under the IGRA's framework, which has proven to be enormously successful. The IGRA helped spur dramatic growth in Indian gaming, from annual revenues of approximately $100 million in 1988 to approximately $28.5 billion in 2014.[38] Recent scholarship demonstrates that, as Congress intended, Indian gaming has helped strengthen tribal economies, increase household income for reservation Indians, and reduce reservation poverty and unemployment rates.[39]

E. Gaming by the Ysleta del Sur Pueblo and Resulting Litigation

Just as the public policy of the State of Texas with regard to gaming evolved in the years after the Restoration Act was enacted, so, too, did the public policy of Tribe. However, the Tribe's efforts to pursue gaming within the confines of the law have been thwarted at every turn by the State of Texas.

1. Litigation over the Application of the IGRA

On May 6, 1992, after Texas dramatically expanded the scope of gaming under State law, and after Congress enacted the IGRA to provide a comprehensive regulatory scheme for tribal gaming, the Tribe adopted a bingo ordinance.[40] The Tribe submitted Tribal Bingo Ordinance 00492 to the NIGC for approval, and on October 19, 1993, the ordinance was approved by the Chairman of the NIGC.[41] In February 1992, the Tribe petitioned the Governor of Texas, pursuant to the IGRA, to begin negotiations to enter a class III gaming compact.[42] The Governor, however, refused on the grounds that the State's law and public policy prohibited her from negotiating such a compact.[43] As a result, the Tribe sued to compel the State under the provision of the IGRA that allowed the Federal courts to order a state to the negotiating table.[44] The U.S. Court of Appeals for the Fifth Circuit held that the Restoration Act did not give the Tribe authority to bring such a suit and that the IGRA did not apply.[45]

---

[38] *Compare* 1988 Senate IGRA Report, *supra* note 36, at 22 (Indian gaming "generate[s] more than $100 million in annual revenues to tribes"), *with* Nat'l Indian Gaming Comm'n, *Gaming Revenue Reports*, *available at* http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited Aug. 21, 2015) (Indian gaming revenue $28.5 billion in Fiscal Year 2014).

[39] Randall K.Q. Akee *et al.*, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 185-87, 196-99 (2015). In addition, the growth of Indian gaming in the wake of the IGRA has also proved to be a boon to local and state governments. *Id.* at 199-203.

[40] Ysleta del Sur Tribal Bingo Ordinance No. 00492 (as amended on Oct. 16, 1992; April 15, 1993; July 22, 1993; and Oct. 5, 1993), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/ysletadelsurpueblotrbe/ordappr101993.pdf.

[41] Letter from Anthony J. Hope, Chairman, NIGC, to Tom Diamond, counsel to the Ysleta del Sur Pueblo (Oct. 19, 1993).

[42] *Ysleta del Sur*, 36 F.3d at 1331.

[43] *Id.*

[44] 25 U.S.C. § 2710(d)(7)(B)(iii), *abrogated by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[45] *Ysleta del Sur*, 36 F.3d 1325. The Fifth Circuit's opinion in *Ysleta del Sur*, which was filed approximately seven months after the First Circuit filed its opinion in *Narragansett*, is discussed in greater depth in Part II, *infra*.

Attachment A

The question before the Fifth Circuit was whether the IGRA permitted the Tribe to sue the State for refusing to negotiate a Class III gaming compact.[46] The Fifth Circuit held that the Restoration Act, and not the IGRA, governed the dispute and, finding nothing in the Restoration Act that waived the State's Eleventh Amendment immunity, the court reversed and remanded with instructions to dismiss the Tribe's suit.[47]

First, after a lengthy review of the Restoration Act's legislative history and the *Cabazon* decision,[48] the Fifth Circuit held that "Congress -- and the Tribe -- intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas."[49] Next, after finding that the Restoration Act "establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA," the Fifth Circuit held that the IGRA did not effect a partial repeal of the Restoration Act.[50] The court observed that the IGRA did not expressly repeal conflicting sections of the Restoration Act, and that "[t]he Supreme Court has indicated that 'repeals by implication are not favored.'"[51] The court then observed that implied repeals are especially disfavored when it is suggested that a general statute has impliedly repealed a specific statute,[52] and opined that, with regard to gaming, the Restoration Act is a specific statute applying to two specific tribes in a particular state, while the IGRA is a general statute.[53] The court further asserted that two provisions of the IGRA that reference existing federal law demonstrate that that the IGRA was not intended to trump statutes such as the Restoration Act.[54] Finally, the court noted that Congress in 1993 expressly exempted the Catawba Tribe of Indians ("Catawba") in South Carolina from the IGRA, thereby "evidencing in our view a clear intension on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[55] Having concluded that the IGRA does not effect an implied repeal of contrary provisions of the Restoration Act, the Fifth Circuit wrote: "To borrow IGRA terminology, the Tribe has already made its 'compact' with the state of Texas, and the Restoration Act embodies that compact."[56] The court suggested the only way for the Tribe to game under IGRA would be to petition Congress to amend or repeal the Restoration Act.[57]

---

[46] *Ysleta del Sur*, 36 F.3d at 1327.

[47] *Id.* at 1327, 1335-36.

[48] *Id.* at 1327-31.

[49] *Id.* at 1334 (emphasis added).

[50] *Id.* at 1334-35.

[51] *Id.* at 1335 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987)).

[52] *Id.* (citing *Crawford Fitting*, 482 U.S. at 445).

[53] *Id.*

[54] *Id.* (citing 25 U.S.C. § 2701(5) ("the Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law"); *id.* § 2710(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

[55] *Id.*

[56] *Id.* Having concluded that the IGRA did not apply, and that the Restoration Act contained no language abrogating the State's Eleventh Amendment immunity from suit, the Fifth Circuit held that the Eleventh Amendment barred the Tribe's suit and remanded to the district court with instructions to dismiss. *Id.* at 1335-36.

[57] *Id.* at 1335.

2. Litigation under the Restoration Act

Meanwhile, the Tribe opened the Speaking Rock Casino and Entertainment Center ("Speaking Rock") on its reservation in 1993.[58] Speaking Rock began as a bingo hall, but evolved into "a full-scale casino offering a wide variety of gambling activities played with cards, dice, and balls."[59] In 1999, after Speaking Rock had been open and operating for approximately six years, the State sued under Section 107(c) of the Restoration Act.[60] On September 21, 2001, the district court issued an injunction that "had the practical and legal effect of prohibiting illegal as well as legal gaming activities by the [Tribe]."[61] After an unsuccessful appeal, the Tribe in February 2002 ceased operating those gaming activities prohibited by the injunction.[62] In May 2002, at the request of the Tribe, the district court modified its injunction to allow the Tribe to offer certain specified sweepstakes promotions, but denied the Tribe's request to offer its own sweepstakes.[63] The following year, the Tribe requested permission to offer a sweepstakes promotion selling prepaid phone cards that provided patrons access to "sweepstakes validation terminal[s]"; that request, too, was denied by the district court.[64]

In 2008, upon discovering that the Tribe was operating devices at Speaking Rock that "resembled traditional eight-liner gambling devices and were operated by a card purchased with cash," the State accused the Tribe of violating the injunction and made a motion that the Tribe be held contempt of court.[65] The Tribe sought further clarification of the injunction and a declaration that its "Texas Reel Skill" sweepstakes game did not violate the injunction.[66] In August 2009, the district court granted the State's motion, issued a contempt order, and refused to declare that the Tribe's "Texas Reel Skill" game was legal.[67] A week later, the Tribe sought permission to operate yet another sweepstakes game, which the district court denied in October 2010.[68] The Tribe, however, did not cease operation of its sweepstakes games, and by 2012 it had opened a second sweepstakes operation at the Socorro Entertainment Center ("Socorro").[69] The State made another motion that the Tribe be held in contempt of court in September 2013, and amended that motion multiple times before withdrawing it in favor of a renewed motion for contempt made on March 17, 2014.[70] After holding a two-day evidentiary hearing and accepting more than a 1.5 million pages of documents into evidence,[71] the district court on March 6, 2015,

---

[58] *State v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 U.S. Dist. LEXIS 28026, at *6 (W.D. Tex. Mar. 6, 2015) (hereinafter, "*State v. Ysleta del Sur Pueblo*").

[59] *Id.*

[60] *Id.* at 3.

[61] *Id.* at *6-7 (internal quotation and citation omitted; alteration in original).

[62] *Id.* at *8.

[63] *Id.* at *9-10.

[64] *Id.* at *11.

[65] *Id.* at *11-12.

[66] *Id.* at *12-13.

[67] *Id.* at *12-14.

[68] *Id.* at *14-15.

[69] *Id.* at *15.

[70] *Id.* at *15-16.

[71] *Id.* at *16-17.

held the Tribe in contempt and ordered that it cease all sweepstakes operations within sixty days or face civil penalties of $100,000 per day, unless the Tribe submitted "a firm and detailed proposal setting out a sweepstakes promotion that operates in accordance with federal and Texas law," the submission of which would result in a stay of the contempt sanctions while the court considered the Tribe's proposal and the State's response.[72] On May 5, 2015, the Tribe submitted its proposal,[73] which the State has opposed.[74]

F. The Tribe's Amended Gaming Ordinance and the NIGC Request

On August 17, 2015, the Tribe resubmitted[75] to the NIGC an amendment to its gaming ordinance.[76] The NIGC has asked the Solicitor's Office for clarification as to the Tribe's "eligibility to engage in Class II gaming under the [IGRA] in light of the [Restoration Act] and the Fifth Circuit Court of Appeal's interpretation of it in *Ysleta del Sur Pueblo v. State of Texas*."[77]

II. ANALYSIS

Congress has not spoken directly to the issue of whether the Restoration Act or the IGRA governs gaming on the Tribe's reservation and tribal lands. The Restoration Act neither expressly anticipates and provides for the possibility that subsequent legislation might render certain sections of it obsolete, nor does it expressly insulate its provisions from subsequently enacted contrary legislation. Likewise, the IGRA does not make any direct or indirect references to the Restoration Act, the Tribe, or the State. As explained in greater detail throughout our analysis, we recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands.[78] However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.[79]

---

[72] *Id.* at *118-20.

[73] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 513 (May 5, 2015).

[74] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 514 (June 5, 2015).

[75] The Pueblo previously submitted this amendment to the NIGC Chairman on March 21, 2014; June 6, 2014; August 29, 2014; November 24, 2014; February 24, 2015; and May 19, 2015. 2015 NIGC Letter, *supra* note 1, at 1.

[76] Letter from Randolph H. Barnhouse, Counsel for Ysleta del Sur, to Jonodev Osceola Chaudhuri, Chairman, NIGC (Aug. 17, 2015).

[77] 2015 NIGC Letter, *supra* note 1, at 1 (footnotes omitted).

[78] *See generally Ysleta del Sur*, 36 F.3d 1325 (5th Cir. 1994).

[79] An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); *cf. Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). *See also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.

In interpreting a statute that we are charged with administering, we seek to effect the intent of the Congress that enacted the statute.[80] Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer "whether Congress has spoken directly to the precise question at issue" and, if the statute is clear, then the agency must give effect to "the unambiguously expressed intent of Congress."[81] If, however, the statute is "silent or ambiguous," as are both the Restoration Act and the IGRA, then the agency must base its interpretation on a "reasonable construction" of the statute.[82]

When confronted with a statute that was enacted for the benefit of Indians, as were both the Restoration Act and the IGRA, if that statute contains ambiguities we are guided by an additional principle:: "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[83]

Employing both the standard rules of statutory construction and the Indian canon, and applying the Department's expertise in the field of Indian affairs,[84] the Department interprets the IGRA as impliedly repealing the gaming provisions of the Restoration Act. Therefore, we conclude that the IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands.

Our interpretation contains four distinct subparts. First, having analyzed both the text and the legislative history of the IGRA, employing both the standard rules of statutory construction and the Indian canon, we concur in your conclusion[85] that Congress intended for the IGRA to apply to the Tribe. Second, we conclude that the Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA and, therefore, that the IGRA governs gaming on the Tribe's reservation and tribal lands. Third, we conclude that Section 107 of the Restoration Act is repugnant to the IGRA and, therefore, that the statutes cannot be harmonized. Finally, we conclude that in this conflict the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act.

A. Both the text of the IGRA and its legislative history demonstrated that Congress intended for the IGRA to apply to the Tribe.

The IGRA "is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands."[86] Among the IGRA's "stated goals [was] to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes as a means of promoting tribal

---

[80] *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) ("The question whether federal law authorize[s] certain federal agency action is one of congressional intent.").

[81] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[82] *Id.* at 840.

[83] *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

[84] *Cherokee Nation v. United States*, 73 Fed. Cl. at 497 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

[85] *See* 2015 NIGC Letter, *supra* note 1, at 2. Although we have not seen your analysis, we reach the same conclusion and, therefore, concur.

[86] *Narragansett*, 19 F.3d at 689.

Attachment A

economic development, self-sufficiency, and strong tribal governments.'"[87] The text of IGRA, itself, contains no express exemption for the Tribe, or for any other tribe; rather, the IGRA is written broadly to encompass all federally recognized Indian tribes.[88] Thus, "[b]y its own terms, the [IGRA], if taken in isolation, applies to any federally recognized Indian tribe that possesses powers of self-governance."[89] Therefore, given IGRA's broad purposes, and the fact that nothing in the plain language of IGRA expressly excludes the Tribe, we conclude that, on its face, IGRA applies to the Tribe.

The Fifth Circuit, however, pointed to two sections of the IGRA that make reference to "other federal law," and that it believed demonstrated Congress's intent that the IGRA not supersede the gaming provisions of the Restoration Act and similar statutes. Noting that the IGRA was enacted scarcely a year after the Restoration Act, the court wrote that Congress "explicitly stated in two separate provisions of the IGRA that IGRA should be considered in light of other federal law,"[90] the Fifth Circuit interpreted these two sections as providing that the IGRA does not apply where Congress had previously spoken to gaming, as it had in the Restoration Act.[91]

We interpret these provisions differently than the Fifth Circuit. The Senate Report on the IGRA explains that this language instead "refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175."[92] In other words, the language that the Fifth Circuit relied upon in finding that the text of the IGRA expressly exempted tribes for whom prior Federal law addressed gaming was, instead, intended to make clear that the IGRA did not legalize certain *games* that were already illegal as a matter of Federal law.

The legislative history of the IGRA contains no specific evidence that Congress sought to exclude the Tribe from the IGRA's ambit. The 1988 Senate IGRA Report contains no specific

---

[87] *Wells Fargo Bank*, 658 F.3d at 687 (quoting 25 U.S.C. § 2702(1)).

[88] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.")

[89] *Passamaquoddy*, 75 F.3d at 788 (citing 25 U.S.C. § 2703(5)).

[90] *Ysleta del Sur*, 36 F.3d at 1335 (citing 25 U.S.C. § 2701(5) ("The Congress finds that – (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming is not specifically prohibited by Federal law* and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (emphasis added)); and 25 U.S.C. § 2701(b)(1)(A) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (*and such gaming is not otherwise specifically prohibited on Indian lands by Federal law*)" (parenthetical in original, emphasis added))).

[91] *Id.*

[92] 1988 Senate IGRA Report, *supra* note 36, at 12. The 1988 Senate IGRA Report also explains that the IGRA was not intended to "supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act and the [Maine] Indian Claim Settlement Act (citations omitted). *Id.* This language does not change our analysis. The Restoration Act expressly provides that it *is not* a grant of Federal authority or jurisdiction with regard to gaming, but is instead merely an extension of the State's substantive gaming law with a specified federal court remedy. Restoration Act, *supra* note 2, at § 107(a) (applying State's substantive gaming law), § 107(b) (no grant of jurisdiction to the State), § 107(c) (remedy in federal court).

Attachment A

references to the Tribe, the State of Texas, or the Restoration Act.[93] That Report does explain that Congress did not intend for the IGRA to "supersede any specific restriction or grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute," citing as a specific example the Maine Indian Claims Settlement Act.[94] However, the Restoration Act contains no "specific restriction . . . of Federal authority," and although Section 105(f) provides for a general grant of jurisdiction to the State, Section 107(c) specifically states that that grant of jurisdiction *does not* give the State jurisdiction over gaming.[95]

The Fifth Circuit concluded that Congress's 1993 decision to exclude the Catawba in South Carolina from the IGRA's ambit was evidence of "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[96] However, the actions of the 103[d] Congress shed no light whatsoever on the intentions of the 100th Congress at the time that it enacted the IGRA; rather, the fact that specific legislation was required to place the Catawba outside the IGRA's ambit in South Carolina strongly suggests that, absent an explicit act such as that taken with the Catawba, a tribe must be presumed to fall within the IGRA's ambit. Consequently, because no act of Congress expressly places the Tribe outside of the IGRA's scope, we interpret the IGRA as including the Tribe within its ambit.

Therefore, we conclude that the gaming on the Tribe's reservation and Indian lands falls within the ambit of the IGRA.

B. The Tribe possesses and exercises jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA.

The IGRA is not applicable to all land owned by a tribe. First, the IGRA provides for gaming only on "Indian lands," a category which includes: (1) land located within the exterior boundaries of a tribe's reservation; and (2) trust land and restricted fee land over which a tribe exercises governmental authority.[97] Second, the IGRA requires that a tribe possess legal

---

[93] *See generally* 1988 Senate IGRA Report, *supra* note 36.

[94] *Id.* at 12 (citations omitted). The Maine Indian Claims Settlement Act provides in part that any subsequently enacted Federal laws "for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." 25 U.S.C. § 1735.

[95] *Compare* Restoration Act, *supra* note 2, *with* Maine Indian Claims Settlement Act, 25 U.S.C. § 1735. The Restoration Act – enacted by the very same Congress that enacted the IGRA scarcely a year later – contains no language whatsoever that would preserve its gaming provisions in the face of subsequently enacted Federal law, such as the IGRA.

[96] *Ysleta del Sur*, 36 F.3d at 1135.

[97] The IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). The NIGC's regulations further define "Indian lands" and specify that in order for land outside of a tribe's reservation to qualify as Indian lands the tribe must exercise governmental authority over that land. 25 C.F.R. § 502.12 (defining "Indian lands" as "land within the limits of an Indian reservation," "land over which an Indian tribe exercises governmental power . . . [and is] [h]eld in trust by the United States for the benefit of any Indian tribe or individual," or "land over which an Indian tribe exercises

jurisdiction over the land.[98] There is a presumption that tribes possess legal jurisdiction over land located within the exterior boundaries of their own reservations.[99] Where there is a question as to the tribe's jurisdiction, courts have found that a tribe must meet two requirements[100]: First, the provisions of the IGRA related to Class I and class II gaming require that a tribe must *have jurisdiction* over the land;[101] second, the provision defining the elements of "Indian lands" requires that a tribe must *exercise governmental power* over the land.[102]

Courts have found that possession of legal jurisdiction over land is a threshold requirement to the exercise of governmental power required for trust and restricted fee land.[103] Whether a tribe possess *legal jurisdiction* over a particular parcel of land often hinges on construing settlement or restoration acts that limit the tribe's jurisdiction[104] or on a determination of which tribe possesses jurisdiction over a particular parcel of land.[105] A showing of *governmental power* requires a concrete manifestation of authority and is a factual inquiry.[106] For trust or restricted fee land to qualify as Indian lands over which a tribe possess jurisdiction, the two requirements of having jurisdiction and exercising governmental authority must both be met. Once a tribe has established that its land qualifies as Indian lands and that the tribe possesses jurisdiction over that

---

governmental power . . . [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

[98] 25 U.S.C. § 2710(b)(1) (providing that, subject to enumerated criteria, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction"); *id.* at § 2710(d)(1)(A)(i) (providing that, subject to enumerated criteria, "Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands").

[99] Letter from Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, to Jo-Ann Shyloski, Associate General Counsel, NIGC, at 4-5 n.26 and decisions cited therein (Aug. 23, 2013) [hereinafter "2013 Wampanoag Opinion Letter"], *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f20130823AquinnahSettlementActInterpretationsigned.pdf&tabid=120&mid=957.

[100] *Narragansett*, 19 F.3d at 701.

[101] *Id.* (citing 25 U.S.C. § 2710(b)(1)).

[102] *Id.* (citing 25 U.S.C. § 2703(4)).

[103] *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."); *Narragansett*, 19 F.3d at 701-03 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), *as stated in Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

[104] *See, e.g., Narragansett*, 19 F.3d at 701-02 (finding that Narragansett Indian Tribe possessed the requisite jurisdiction to trigger the IGRA in light of the tribe's settlement act); 2013 Wampanoag Opinion Letter, *supra* note 99, at 5 n.31 and authorities cited therein.

[105] Letter from Lawrence S. Roberts, General Counsel, NIGC, et al., to Tracie Stevens, Chairwoman, NIGC, at 10-13 (May 24, 2012) (determining that Muscogee (Creek) Nation had jurisdiction over land in question and that the Kialegee Tribal Town had not demonstrated that it had legal jurisdiction), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltownopinion52412.pdf&tabid=120&mid=957; 2013 Wampanoag Opinion Letter, *supra* note 99, at 5-6 n.32 and authorities cited therein.

[106] *Narragansett*, 19 F.3d at 703.

land—making it eligible for Indian gaming—the tribe has the exclusive right to regulate gaming on that land, and a state can extent its jurisdiction only through a tribal-state compact.[107]

Approximately twenty years ago, the First Circuit in *Rhode Island v. Narragansett Indian Tribe*[108] determined whether a tribe's settlement act prohibited gaming. It created a two-step analysis, first asking whether the tribe possesses the requisite jurisdiction for the IGRA to apply to the tribe's lands; and next asking whether the tribe's settlement act and the IGRA can be read together, or whether the IGRA impliedly repealed the settlement act's gaming provisions.[109] This office has since used the *Narragansett* framework to evaluate whether the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 prohibited the Wampanoag Tribe of Gay Head (Aquinnah) from gaming.[110] Because the settlement act at issue in *Narragansett* and the Restoration Act at issue here raise similar questions with respect to gaming and the application of the IGRA, we employ that framework here.[111]

In applying the *Narragansett* court's framework to the present question, we begin by asking whether the Ysleta del Sur Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the application of the IGRA.[112] To determine whether the Tribe possesses the requisite jurisdiction for the IGRA to apply, we must first determine what the IGRA's reference to "jurisdiction" means.[113] A basic tenet of Indian law dictates that tribes retain attributes of sovereignty, and therefore jurisdiction, over their lands and members.[114] In *Narragansett*, the court explained that the jurisdiction required for the IGRA to apply is derived from a tribe's retained rights flowing from their inherent sovereignty.[115] Against that backdrop, we construe the IGRA's language.

As noted above, statutory interpretation begins with the plain meaning of the language itself. With respect to class II gaming, the IGRA states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands* within such tribe's jurisdiction."[116] With regard to class III gaming, the IGRA explains that "[a]ny Indian tribe having jurisdiction over the *Indian*

---

[107] 25 U.S.C. § 2701(5) ("The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

[108] 19 F.3d 685 (1st Cir. 1994).

[109] *Id.*

[110] 2013 Wampanoag Opinion Letter, *supra* note 99, at 4-5 n.26 and decisions cited therein.

[111] *See generally id.* In *Narragansett*, the First Circuit held that the Narragansett Indian Tribe ("Narragansett Tribe") possessed and exercised jurisdiction under its settlement act that was sufficient to trigger the application of the IGRA. 19 F.3d at 700-03. Upon concluding that the IGRA was triggered, the court examined the interplay between the settlement act and the IGRA and concluded that the IGRA effected an implied partial repeal of portions of the settlement act. *Id.* at 703-05.

[112] 2013 Wampanoag Opinion Letter, *supra* note 99, at 7-15.

[113] *Id.* at 7.

[114] The U.S. Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon*, 480 U.S. at 207 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

[115] 19 F.3d at 701 ("We believe that jurisdiction is an integral aspect of retained sovereignty.").

[116] 25 U.S.C. § 2710(b)(1) (emphasis added).

Attachment A

lands upon which a class III gaming activity is being conducted" must enter into a compact with the state.[117] It further requires that a gaming ordinance authorizing class III gaming be "adopted by the governing body of the Indian tribe having jurisdiction over *such lands*."[118] In each of the IGRA's three references to its jurisdictional requirement, the statute clearly states that a tribe must possess jurisdiction over its lands.[119]

We, like the First Circuit, also view as important the amount of jurisdiction a tribe must possess in order to trigger application of the IGRA. Tribes possess aspects of sovereignty not ceded by treaty or withdrawn by statute or by implication as a necessary result of their dependent status.[120] In other words, tribes are presumed to have jurisdiction over their land unless it has been ceded or withdrawn. When Congress enacts a status depriving a tribe of jurisdiction, it must do so explicitly.[121] Furthermore, "acts diminishing the sovereign rights of Indian [t]ribes should be strictly construed."[122] This statutory rule is bolstered by the Indian canon of construction.

We require Congress's explicit divestiture of tribal jurisdiction to avoid the IGRA's application to Indian lands, as did the *Narragansett* court.[123] In other words, unless a tribe has been completely divested of jurisdiction, the IGRA applies. A mere grant of state jurisdiction is not enough to find the State has exclusive jurisdiction over the land.[124]

Here, the Restoration Act does not confer upon the State *jurisdiction* over gaming on the Tribe's reservation and tribal lands, but instead merely provides that "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."[125] This merely codified the distinction, set forth in *Cabazon* and affirmed in the IGRA, between *regulated* gaming activities, which a tribe may engage in pursuant to the IGRA, and *prohibited* gaming activities, which a tribe may engage in only under the terms of a compact

---

[117] *Id.* § 2710(d)(3)(A) (emphasis added).

[118] *Id.* § 2710(d)(1)(A)(i) (emphasis added).

[119] 2013 Wampanoag Opinion Letter, *supra* note 99, at 8 n.57 and authorities cited therein.

[120] *Narragansett*, 19 F.3d at 701 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

[121] *Id.* at 702 ("Since the settlement Act does not *unequivocally articulate* an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive" (emphasis added)); Letter from Michael J. Anderson, Acting Assistant Secretary – Indian Affairs, to Patricia A. Marks, Attorney, Wampanoag Tribe of Gay Head, at 3 (Sept. 5, 1997) [hereinafter "1997 AS-IA Letter"] (pointing to "long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty" and explaining that "[i]n this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed" (citing *Bryan*, 426 U.S. at 392)).

[122] *Narragansett*, 19 F.3d at 702.

[123] *Id.* at 702. The Assistant Secretary also has emphasized this point. 1997 AS-IA Letter, *supra* note 121, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction.").

[124] 2013 Wampanoag Opinion Letter, *supra* note 99, at 9; *Narragansett*, 19 F.3d at 702 (because the Settlement Act's "grant of jurisdiction to the state is non-exclusive," the Narragansett Tribe "retain[s] that portion of jurisdiction they possess by virtue of their sovereign existence as a people – a portion sufficient to satisfy the Gaming Act's 'having jurisdiction' prong.").

[125] Restoration Act, *supra* note 2, § 107(a).

with a state. At most, Section 107(a) functions as a choice-of-law provision, employing the State's substantive gaming law to set the bounds of permissible gaming on the Tribe's reservation and tribal lands. Under either reading of the Restoration Act, Section 107(a) diminishes the Tribe's sovereign right to enact its own gaming laws; however, it does not diminish the Tribe's jurisdiction, on its reservation and tribal lands, to regulate gaming activities undertaken in accordance with the State's substantive gaming laws.

In addition, the application of the State's gaming laws on the Tribe's reservation and tribal lands must be strictly construed, under basic tenets of Indian law and the *Narragansett* framework. No provision of the Restoration Act expressly, or even impliedly, divests the Tribe of *regulatory* jurisdiction over its reservation and tribal lands. In fact, Section 107(b) of the Act provides: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Moreover, Section 107(c) of the Restoration Act provides that Federal courts "have exclusive jurisdiction over" alleged violations of Section 107(a), thereby impliedly divesting the Tribe only of its *adjudicatory* jurisdiction over gaming disputes that arise under the Act. Therefore, the Tribe retains nearly complete civil and criminal regulatory jurisdiction over its reservation and tribal lands, except for the narrow exception for Federal court jurisdiction provided in Section 107(c), which means that the State does not and cannot have exclusive jurisdiction over those lands.[126]

In addition, the Restoration Act's only grant of jurisdiction to the State, contained in Section 105(f), does not suggest that such State jurisdiction is exclusive. Instead, it merely provides that the State has civil and criminal jurisdiction on the Tribe's reservation and Indian lands consistent with Public Law 280, as amended by the Indian Civil Rights Act,[127] which does not extinguish the Tribe's inherent jurisdiction, but instead merely authorizes the State to exercise jurisdiction concurrent with that of the Tribe.[128] Section 105(f) does not use the words "exclusive" or

---

[126] Both the Assistant Secretary and this Office have observed that the gaming provisions of the Restoration Act differed markedly from those contained in the Massachusetts Indian Land Claims Settlement act. 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95; 1997 AS-IA Letter, *supra* note 121, at 5. Neither letter contained an in-depth analysis of the Restoration Act, and neither concluded that the Restoration Act completely divested the Tribe of jurisdiction over gaming on its reservation and tribal lands; rather, both letters simply observed that the differences in the two statutes provided a reason not to follow the Fifth Circuit's *Ysleta del Sur* opinion in their respective analyses of the Massachusetts Indian Land Claims Settlement Act. *Id.* Even if those Letters had concluded that the Restoration Act completely divested the Tribe of jurisdiction over its reservation and tribal lands, they would not preclude us from reconsidering that opinion in this Memorandum. *See Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.").

We are aware of the Assistant Secretary's statement that the Restoration Act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas on the reservation and lands of the Ysleta del Sur Pueblo." 1997 AS-IA Letter, *supra* note 121, at 5; 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95 (quoting AS-IA Letter). This statement was not made in a detailed analysis of the Restoration Act, itself, but rather, in the Assistant Secretary's analysis of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, and therefore is not dispositive here.

[127] Restoration Act, *supra* note 2, § 105(f). Nothing in Section 105(f) suggests that the grant of jurisdiction to the State is exclusive.

[128] 1-6 Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2012) ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched" (internal citations omitted)).

"complete" in describing the jurisdiction conferred upon the State in Section 105(f).[129] It does, however, use the word "exclusive" in Section 107(c) to describe the grant of jurisdiction to the federal courts for resolution of gaming disputes arising from the provisions of Section 107(a).[130] "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[131]

In sum, the Restoration Act does not grant the State exclusive jurisdiction over the Pueblo's land and does not divest the Pueblo of its inherent jurisdiction. To the contrary, the Act specifically declares that it is not a grant of civil and criminal regulatory jurisdiction to the State.[132]

C. Section 107 of the Restoration Act and the IGRA are repugnant to each other.

Because the Tribe possesses sufficient jurisdiction to trigger application of the IGRA, we must determine whether the IGRA effected an implied repeal of any portion of the Restoration Act. When two federal statutes touch on the same subject matter, courts should attempt to give effect to both if they can be harmonized.[133] Therefore, "so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective."[134] However, if portions of the statutes are repugnant to each other, one must prevail over the other.[135] Even where the two statutes are not outright repugnant, "a repeal may be implied in cases where the later statutes covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.'"[136] When a later statute impliedly repeals a former statute, a partial repeal is preferred and only the parts of the former statute that are in plain conflict with the later should be nullified.[137]

---

[129] *See Narragansett*, 19 F.3d at 702 ("omission of words such as 'exclusive' or 'complete'" in statute assigning jurisdiction was "meaningful"); *United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (finding absence of terms "exclusive" or "complete" in Federal statute's grant of jurisdiction over offenses committed by or against Indians meant the statute only extended to the state jurisdiction concurrent with that of the Federal government).

[130] *Compare id.* § 105(f) (no use of "exclusive" or "complete"), *with* § 107(c) ("Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) . . . ."). Section 107(c), would have been particularly important in the pre-IGRA environment in which the Restoration Act was negotiated and ultimately enacted. Because we conclude that the IGRA effects a partial implied repeal of the Restoration Act's gaming provisions, Section 107(c) is less relevant today.

[131] *Narragansett*, 19 F.3d at 702 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

[132] The second part of the Indian lands determination, whether the tribe exercises governmental power, is a more fact-based determination than the jurisdictional question, and does not require construction of the Restoration Act; therefore, we leave this determination to the NIGC. 2013 Wampanoag Opinion Letter, *supra* note 99, at 14-15. Nonetheless, we note that, unlike the settlement act at issue in *Narragansett*, which expressly limited the Narragansett's *exercise* of jurisdiction over its settlement lands, *see* 25 U.S.C. § 1771e, the Restoration Act contains no language whatsoever limiting the Tribe's exercise of governmental power on its reservation or tribal lands.

[133] *Narragansett*, 19 F.3d at 703.

[134] *Id.* at 703 (citing *Traynor v. Tumage*, 485 U.S. 535, 547-48 (1988); *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 82 (1871)).

[135] *Id.* (citing *Tynen*, 78 U.S. (11 Wall.) at 92).

[136] *Id.* at 703-04 (citing, *inter alia*, *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936); *Tynen*, 78 U.S. (11 Wall.) at 92).

[137] *Id.* at 704 n.19.

We and the Fifth Circuit agree that the gaming provisions of the Restoration Act cannot be read in harmony with the IGRA.[138]

The Fifth Circuit concluded that, by enacting the Restoration Act, "Congress . . . intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas."[139] Approximately one year later, however, in enacting the IGRA, Congress "expressly preempt[ed] the field in the governance of gaming activities on Indian lands"[140] by creating a nationwide regulatory framework that "struck a 'finely-tuned balance between the interests of the states and the tribes' to remedy the *Cabazon Band* prohibition on state regulation of Indian gaming."[141] If, as the Fifth Circuit concluded, Section 107(a) was enacted to serve as surrogate federal law on the Tribe's reservation, and the IGRA was enacted to "expressly preempt the field" and to "str[ike] a 'finely-tuned balance between the interests of the states and the tribes,'" then Section 107(a) cannot be harmonized with the IGRA.

Although the Department, too, concludes that the Restoration Act and the IGRA cannot be reconciled, we respectfully follow a different path than did the Fifth Circuit. We interpret Section 107(a) as codifying the distinction, set forth in *Cabazon* and enacted in the IGRA, between civil/regulatory laws and criminal/prohibitory laws. In Section 107(a), Congress ensured that gaming prohibited by the State of Texas could not take place on the Tribe's reservation and tribal lands.[142] Under this interpretation, Section 107(a), in and of itself, is not repugnant to the IGRA.

However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of their provisions. The Restoration Act provides that violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas."[143] Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a).[144] The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme.[145]

---

[138] *See* Part II.A, *supra*.

[139] *Ysleta del Sur*, 36 F.3d at 1334.

[140] 1988 Senate IGRA Report, *supra* note 36, at 6.

[141] *Texas v. United States*, 497 F.3d 491, 506-507 (5th Cir. 2007) (quoting *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1988)); *see also Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 526 (D.S.D. 1993) (citing 1988 Senate IGRA Report, *supra* note 36), *aff'd* 3 F.3d 273 (8th Cir. 1993).

[142] We are aware that the Fifth Circuit expressly rejected this interpretation. *Ysleta del Sur*, 36 F.3d at 1333-34. As set forth *supra*, the Department, as the agency with responsibility for implementing the Restoration Act, may adopt an alternative interpretation.

[143] Restoration Act, *supra* note 2, § 107(a).

[144] *Id.* § 107(c).

[145] 18 U.S.C. §§ 1166-1168 (IGRA criminal laws and penalties; 25 U.S.C. § 2706(b)(10) (NIGC has authority to promulgate regulations for implementation of the IGRA; 25 U.S.C. § 2713 (civil penalties for violation of the IGRA); 25 C.F.R. Part 573 (Compliance and Enforcement); 25 C.F.R. Part 575 (Civil Fines).

Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

D. In the conflict between Section 107 of the Restoration Act and the IGRA, the IGRA prevails, thus impliedly repealing Section 107.

As the Fifth Circuit noted in *Ysleta del Sur*, "repeals by implication are not favored."[146] Nonetheless, when two statutes cannot be reconciled, one must prevail over the other.[147] Here, our analysis diverges more sharply from that of the Fifth Circuit.

The general rule, as set forth by the *Narragansett* court, is that "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[148] In the conflict between Section 107 of the Restoration Act and the IGRA, this general rule suggests, absent good cause to the contrary, that the IGRA prevails. In addition, in its analysis of the interplay between the Restoration Act and the IGRA, not only did the Fifth Circuit neglect to apply or even acknowledge the Indian canon, it also failed to employ or even acknowledge "the general rule . . . that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[149] IGRA was enacted approximately one year after the Restoration Act.

The Fifth Circuit held that the Restoration Act prevails because it, being applicable to only two tribes in a single state, is a specific statute and the IGRA, being of nationwide application, is a general statute.[150] However, the IGRA also is a specific statute because it is specifically directed to the issue of Indian gaming, while the Restoration Act is a general statute because its primary purpose is to restore the Federal trust relationship, with gaming constituting only one part of that statute. The district court in *Narragansett* concluded as much with respect to the Rhode Island Settlement Act.[151] Moreover, where "the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging the presumption" that Congress did not intend its later statute to act upon the earlier one.[152]

In addition, our conclusion that the IGRA prevails preserves the core of both acts. The primary purpose of the Restoration Act was to restore the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas.[153] The Act's gaming provisions were enacted to fill a legal and jurisdictional void that existed at that time, before the IGRA was enacted.[154] Consequently, an interpretation of the two

---

[146] *Ysleta del Sur*, 36 F.3d at 1335 (quoting *Crawford Fitting*, 482 U.S. at 442).

[147] *Narragansett*, 19 F.3d at 703.

[148] *Id.* at 704.

[149] *Narragansett*, 19 F.3d at 704 (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

[150] *Ysleta del Sur*, 36 F.3d at 1335.

[151] *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 804 (D.R.I. 1993) (holding that, for purposes of gaming, the IGRA is a specific act and the tribe's settlement act is a general act), *aff'd* 19 F.3d 685.

[152] *Narragansett*, 19 F.3d at 704 n.21.

[153] Restoration Act, *supra* note 2, Title.

[154] *See* Part I.B, *supra*.

statutes that finds that the IGRA impliedly repeals Section 107 of the Restoration Act nevertheless leaves the core of the Restoration Act intact.[155] Moreover, the IGRA filled the legal and jurisdictional gap that existed at the time the Restoration Act was enacted, further mitigating any harm from finding an implied repeal of Section 107. On the other hand, the IGRA by its plain language was intended to apply to all Indian tribes,[156] and one of its stated purposes was "to expressly preempt the field in the governance of gaming activities on Indian lands"[157] Although Congress has expressly exempted certain tribes from the operation of the IGRA,[158] to find such an exemption without any express statutory exemption would undermine the goal of a "comprehensive regulatory framework"[159] the IGRA.

Finally, our conclusion that the IGRA effects an implied repeal of the gaming provisions of the Restoration Act is the only conclusion that is consistent with the Indian canon of construction. When choosing between two reasonable interpretations of a statute enacted for the benefit of Indians, the Indian canon itself is not dispositive of the issue, but rather, it is an essential lens through which statute's text, "the 'surrounding circumstances,' and the 'legislative history' are to be examined."[160] The IGRA is a statute enacted for the benefit of Indians and Indian tribes.[161] Although the Fifth Circuit had previously recognized the role that the Indian canon plays in interpreting statutes enacted for the benefit of Indian tribes,[162] it did not employ, or even acknowledge, the relevance of the Indian canon to the determination of whether the IGRA governs gaming on the Tribe's reservation and tribal lands. Therefore, we depart from the Fifth Circuit and apply the construction that favors the Tribe.

We conclude that the IGRA effects an implied repeal of Section 107 of the Restoration Act. In doing so, however, we note that our opinion does nothing to undermine the gaming prohibitions that currently exist in Texas law. The State already provides for bingo, which is the functional equivalent of the Class II gaming governed by the gaming ordinance that the Tribe submitted to

---

[155] *Cf. Narragansett*, 19 F.3d at 704 (reading the IGRA and the settlement act at issue such that the IGRA prevailed "leaves the heart of the Settlement Act untouched").

[156] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means *any* Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government" (emphasis added).).

[157] 1988 Senate IGRA Report, *supra* note 36, at 6.

[158] *See, e.g.*, 25 U.S.C. § 941l (the IGRA does not apply to the Catawba Indian Tribe of South Carolina); 25 U.S.C. § 1708(b) (Narragansett settlement lands are not "Indian lands" for purposes of the IGRA); *see also Passamaquoddy*, 75 F.3d 784 (holding that savings clause in the Maine Indian Claims Settlement Act, paired with the IGRA's lack of any specific reference to any applicability in the State of Maine, effectively exempted tribes within the State of Maine from operation of the IGRA).

[159] *Wells Fargo Bank*, 658 F.3d at 687.

[160] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

[161] 25 U.S.C. § 2702(1) (among purposes of the IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments"); *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes" (citing IGRA's declaration of policy contained in 25 U.S.C. § 2702(1))).

[162] *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (1981) ("The Supreme Court . . . has stated that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" (quoting *Bryan*, 426 U.S. at 392)).

the NIGC. Under the IGRA, the Tribe may not engage in Class III gaming unless it first reaches a compact with the State. In other words, our conclusion that the IGRA governs gaming on the Tribe's reservation and tribal lands preserves the authority of both the Tribe and the State to pursue their respective public policies toward gaming.

III. CONCLUSION

A comprehensive reading of the interplay between the Restoration Act and the IGRA leads us to conclude that the IGRA applies to the Ysleta del Sur Pueblo. The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by the enactment of the IGRA, scarcely one year after the Restoration Act.

Because Section 107 of the Restoration Act contains enforcement provisions that are at odds with the IGRA, the two statutes cannot be harmonized. In that conflict, the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act. Our conclusion is consistent with the rule that favors the later-enacted statute, which in this case is the IGRA. In addition, an implied repeal of Section 107 leaves the core of the Restoration Act intact, while an implied exception to the IGRA would undermine the national regulatory scheme at that statute's core, and undermine its goal of providing opportunities for tribal economic development. This interpretation is consistent with the text of the IGRA, the legislative histories of both the Restoration Act and the IGRA, and the Indian canon of construction.

Therefore, in answer to your question, we conclude that the Restoration Act does not prohibit the Ysleta del Sur Pueblo from gaming on its Indian lands under IGRA.

Sincerely,

Venus McGhee Prince
Deputy Solicitor for Indian Affairs

Attachment A

October 8, 2015

Nita Battise, Chairperson
Alabama-Coushatta Tribe of Texas
571 State Park Road 56
Livingston, TX 77351

RE: Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance and Resolution No. 2015-038.

Dear Chairperson Battise:

This letter responds to the request by the Alabama-Coushatta Tribe of Texas July 10, 2015, to the National Indian Gaming Commission to review and approve the Tribe's Class II gaming ordinance. The gaming ordinance was adopted by Resolution No. 2015-038 by the Alabama-Coushatta Tribal Council.

Resolution No. 2015-038 adopts the Tribal gaming ordinance, which was created to govern and regulate the operation of Class II gaming on the Tribe's *Indian lands.* Because the Tribe's ordinance permits it to conduct gaming on its *Tribal Indian lands,*[1] as defined by the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act (Restoration Act)[2] an analysis of whether the Tribe's lands are eligible for gaming was necessary.

Analysis

The Alabama-Coushatta's ordinance permits it to conduct gaming on its *Tribal Indian lands.*[3] It defines *Indian Lands, Tribal Lands*, or *Tribal Indian lands* as all lands within the limits of the Tribe's Reservation. It additionally defines *Tribal Indian lands* "as lands acquired by the Secretary in trust prior to October 17, 1988, or those lands acquired by the Secretary in trust after October 17, 1988, that meet one or more of the exceptions set forth in 25 U.S.C. § 2719. Finally, the Tribe defines *Reservation* as it is defined in the Tribe's Restoration Act.

As discussed in greater detail below, the *Tribal lands* or *Tribal Indian lands* specified in the ordinance amendment are *Indian lands* as defined by IGRA and are eligible for gaming under

[1] Alabama-Coushatta Tribe of Texas II Tribal Gaming Ordinance § 5.
[2] 25 U.S.C. §§ 731 *et seq.*
[3] Alabama-Coushatta Tribe of Texas Class II Tribal Gaming Ordinance § 5.

the Act. The Restoration Act, however, provides a general grant of state jurisdiction over the Alabama-Coushatta's lands, through Public Law 280, and applies state gaming laws to the Tribe's lands, with a qualification. Accordingly, the Restoration Act must be taken into consideration as part of this ordinance review.

Jurisdiction

Because a similar question regarding the Ysleta del Sur Pueblo's Restoration act arose when the Pueblo submitted its ordinance to the NIGC for the Chairman's approval, and the Secretary of the Interior administers tribal restoration acts, the NIGC Office of General Counsel sought the Department of Interior, Office of the Solicitor's opinion as to whether under the Restoration Act the Pueblo can game pursuant to IGRA on its Indian lands; specifically, whether the Pueblo possesses sufficient jurisdiction over its Restoration Act lands for IGRA to apply and if so, how to interpret the interface between IGRA and the Restoration Act.[4] Because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, that same jurisdictional analysis applies to the Alabama-Coushatta's portion of the Restoration Act.

As a preliminary analysis, we must examine the scope of IGRA to determine whether the NIGC has jurisdiction over the Tribe's Restoration Act lands or phrased alternatively, whether the Tribe's Restoration Act lands are exempt from IGRA's domain. Nothing in the IGRA's language or its legislative history indicates that the Tribe is outside the scope of NIGC's jurisdiction. As such, the NIGC has broad jurisdiction over the Tribe's land.

Next, we must look to the Office of the Solicitor's opinion on the Ysleta del Sur Pueblo. On September 10, 2010, the Office of the Solicitor concurred with our conclusion that IGRA applies to the Pueblo and further opined the Pueblo possesses sufficient legal jurisdiction over its settlement lands for IGRA to apply, that IGRA governs gaming on the Pueblo's reservation, and IGRA impliedly repeals the portions of the Restoration Act repugnant to IGRA.[5] Again, because the Tribe and Pueblo share the same Restoration Act, with nearly identical language, the Office of the Solicitor's analysis applies to the Alabama-Coushatta. Therefore, the only remaining questions are whether those lands qualify as Indian lands as defined in IGRA and whether they are eligible for gaming.

Indian Lands

IGRA permits an Indian Tribe to "engage in, or license and regulate, gaming on Indian lands with such Tribe's jurisdiction."[6] It defines *Indian lands* as all lands with the limits of any

[4] May 29, 2015, Letter to Deputy Solicitor, Indian Affairs Venus Prince from NIGC General Counsel, Eric N. Shepard.
[5] September 10, 2015, Letter to NIGC General Counsel, Michael Hoenig, from Deputy Solicitor for Indian Affairs, Venus McGhee Prince. (*Attachment A.)*
[6] 25 U.S.C. § 2710(b)(1).

Indian Reservation.[7] In 1987, the Restoration Act established a reservation for the Alabama-Coushatta, [8] comprised of the Tribe's land holdings at that time. [9] Because the Tribe has a reservation – established a year before Congress passed IGRA –it has IGRA-defined *Indian lands.* Further, the Tribe identified in its ordinance that it authorizes gaming on its *Tribal Indian lands* – defined as all lands within the limits of its *Reservation.* The Alabama-Coushatta's ordinance limits where it can operate a class II gaming facility to its *Reservation*. Accordingly, the Restoration Act lands qualify as *Indian lands* under IGRA.

Finally, because the Tribe's Restoration Act, which created the reservation, pre-dates IGRA, an after-acquired land analysis is not necessary.[10]

Conclusion

In conclusion, because the Tribe possesses sufficient legal jurisdiction over its Restoration Act lands, IGRA applies. Further, because the lands qualify as *Indian lands* under IGRA, the lands are eligible for gaming under IGRA.

Thank you for bringing the amended gaming ordinance to our attention. The ordinance is approved, as it is consistent with the requirements of IGRA and NIGC regulations.

If you have any questions, please contact staff attorney Heather Corson at (202) 632-7003.

Sincerely,

Jonodev O. Chaudhuri
Chairman

Enclosure

cc: Fred Petti
Petti and Briones (via email, only: fpetti@pettibriones.com)

[7] 25 U.S.C. § 2703(4)(A); 25 C.F.R. § 502.12(a): "*Indian lands* means: (a) Land within the limits of an Indian reservation."
[8] 25 U.S.C. § 736(a)
[9] 25 U.S.C. § 731(3).
[10] *See generally* 25 U.S.C. § 2719.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

SEP 10 2015

Michael Hoenig, General Counsel
National Indian Gaming Commission
90 K Street NE, Suite 200
Washington, DC 20002

Re: Ysleta del Sur Pueblo Restoration Act

Dear Mr. Hoenig:

This letter responds to the National Indian Gaming Commission ("NIGC") Office of General Counsel's letter dated May 29, 2015,[1] requesting our opinion regarding whether, in light of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act ("Restoration Act" or "Act"),[2] and the Indian Gaming Regulatory Act ("IGRA"),[3] the Ysleta del Sur Pueblo ("Tribe" or "Pueblo") can game pursuant to the IGRA on the Tribe's reservation and tribal lands.

Applying the Department's expertise in the field of Indian affairs,[4] this Office concludes that the Restoration Act did not divest the Tribe of jurisdiction over its reservation and tribal lands and, therefore, that the IGRA applies to such lands. In addition, we conclude that the IGRA impliedly repealed Section 107 of the Restoration Act, which concerns gaming.

I. BACKGROUND

In order to answer your question, we must interpret those provisions of the Restoration Act that concern jurisdiction, including jurisdiction over gaming. The Restoration Act was enacted in the midst of a sea change in gaming law; consequently, our analysis also considers the evolution of the Act's gaming provisions, the evolution of gaming law in the State of Texas ("Texas" or "State") between 1987 and 1991, and the enactment approximately one year after the Restoration Act of the IGRA. Finally, we evaluate the Tribe's current request in light of the long-running litigation between the State and the Tribe over the Tribe's attempts to game within the bounds of the Restoration Act.

---

[1] Letter from Eric Shepard, General Counsel, Nat'l Indian Gaming Comm'n, to Venus Prince, Deputy Solicitor – Indian Affairs (May 29, 2015) [hereinafter "2015 NIGC Letter"].

[2] Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 731 *et seq.* (Alabama and Coushatta Indian Tribes of Texas), §§ 1300g *et seq.* (Ysleta del Sur Pueblo)). Title I of the Restoration Act addresses the Pueblo; Title II of the Restoration Act restores the Federal trust relationship with the Alabama and Coushatta Indian Tribes of Texas. *Id.*

[3] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721).

[4] *See, e.g., Cherokee Nation v. United States*, 73 Fed. Cl. 467, 479 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

Attachment A

A. History of the Ysleta del Sur Pueblo

The Pueblo of Ysleta del Sur was established in 1680 following the Pueblo Indian revolt against the Spanish.[5] When the Spanish retreated from Santa Fe, New Mexico, to El Paso, Texas, they forced a large number of Tiwa Indians from Ysleta Pueblo to accompany them.[6] The Indians established a new Pueblo in Texas called Ysleta del Sur and, in 1682, built a church for their community.[7] In 1751, Spain granted to the inhabitants of the Ysleta del Sur Pueblo land measuring one league in all directions from the church doors.[8] However, in 1871, the Texas Legislature enacted a statute incorporating the Town of Ysleta in El Paso County, and subsequent actions by the town resulted in nearly all of the 23,000 acres of the Spanish land grant being patented to non-Indians.[9]

From 1870 through the 1960s, the Tribe "continued to reside in the area and maintain their ethnic identification as well as their basic political system . . . . Also during this time there is a record of increasing interactions between the [Tribe] and both the U.S. Government and the State of Texas."[10] In 1968, Congress passed An Act Relating to the Tiwa Indians of Texas,[11] wherein Congress transferred all Federal trust responsibility for the Pueblo to the State of Texas.[12]

B. The Restoration Act

In the 1980s, the State of Texas concluded that its trust relationship with the Tribe constituted a violation of the Texas Constitution and determined that the State could not continue to provide trust services to the Tribe.[13] In light of this determination, Congress acted to restore the Federal trust relationship with the Tribe and passed the Restoration Act in 1987.[14] Through the Restoration Act, Congress provided that the Tiwa Indians of Ysleta, Texas, would thereafter "be known and designated as the Ysleta del Sur Pueblo,"[15] and "restored" "[t]he Federal trust relationship between the United States and the tribe."[16] In addition, the Restoration Act designated as "a Federal Indian reservation" those lands within El Paso and Hudspeth Counties in Texas that were held by the Tribe on the date of the Act's enactment, held in trust by the State or by the Texas Indian Commission for the benefit of the Tribe, or held in trust by the Secretary for the benefit of the Tribe, as well as subsequently acquired lands acquired and held in trust by

---

[5] S. Rep. No. 100-90, at 6 (1987) (hereinafter, "1987 Senate Report").

[6] *Id.*

[7] 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (statement of Rep. Coleman).

[8] 1987 Senate Report, *supra* note 5, at 6.

[9] *Id.* at 7.

[10] 131 CONG. REC. H12012 (statement of Rep. Coleman).

[11] Pub. L. No. 90-287, 82 Stat. 93 (1968), *repealed by* Restoration Act, *supra* note 2, § 106.

[12] *Id.*

[13] 1987 Senate Report, *supra* note 5, at 7.

[14] Restoration Act, *supra* note 2.

[15] *Id.* at § 102 (codified at 25 U.S.C. § 1300g-1).

[16] *Id.* at § 103(a) (codified at 25 U.S.C. § 1300g-2(a)).

Attachment A

the Secretary for the benefit of the Tribe,[17] and mandated that the Secretary take certain lands into trust for the benefit of the Tribe.[18] Furthermore, at Section 105(f) the Act incorporates Public Law 280,[19] as amended by the Indian Civil Rights Act,[20] by providing that the State has civil and criminal jurisdiction on the Tribe's reservation "as if such State had assumed such jurisdiction with the consent of the tribe under" 25 U.S.C. §§ 1321-1322.[21]

The original version of the Restoration Act, introduced in February 1985, contained no specific references to gaming.[22] However, the time between the bill's introduction and its final passage in 1987 was a period of great uncertainty surrounding Indian gaming.[23] The Act was amended multiple times to address gaming.[24]

---

[17] *Id.* at§ 105(a) (codified at 25 U.S.C. § 1300g-4(a)) (establishing a Federal Indian reservation); at § 101(3) (codified at 25 U.S.C. § 1300g(3)) (defining "reservation").

[18] *Id.* at § 105(b)(1) (codified at 25 U.S.C. § 1300g-4(b)) (requiring that the Secretary (1) accept any offer by the State to convey to the United States land within the Tribe's reservation held in trust, and (2) hold such land in trust for the benefit of the Tribe).

[19] Pub. L. 83-280, 67 Stat. 588 (1953)

[20] Pub. L. 90-284, 82 Stat 77 (1968).

[21] Restoration Act, supra note 2, § 105(f) (codified at 25 U.S.C. § 1300g-4(f)).

[22] H.R. 1344, 99th Cong. (1985).

[23] In February 25, 1986, the Ninth U.S. Circuit Court of Appeals held that the State of California and Riverside County could not enforce their gaming laws on the reservations of the Cabazon and Morongo Bands of Mission Indians. *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900 (1986). One year later, the U.S. Supreme Court affirmed. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) [hereinafter, "*Cabazon*"]. The Fifth Circuit subsequently observed that the *Cabazon* decision "led to an explosion in unregulated gaming on Indian reservations located in states that, like California, did not prohibit gaming." *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325, 1330 (5th Cir. 1994) [hereinafter "*Ysleta del Sur*"]; *accord Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1080 (7th Cir. 2015) ("The Court's decision in *Cabazon* led to a flood of activity, and states and tribes clamored for Congress to bring some order to tribal gaming.").

[24] Following a committee hearing on October 1985, the House passed an amended version of the bill that would have allowed the Tribe to enact a gaming ordinance, but only if that ordinance mirrored the laws of Texas. H. Rep. No. 99-440, at 2-3 (1985) (amendments to H.R. 1344); 131 CONG. REC. H12012 (daily ed. Dec. 16, 1985) (text of H.R. 1344 as passed by the House). Nonetheless, "various state officials and members of Texas' congressional delegation were still concerned that H.R. 1344 did not provide adequate protection against high stakes gaming operations on the Tribe's reservation." *Ysleta del Sur*, 36 F.3d at 1327. As a result, the Tribe enacted Resolution No. TC-02-86, which acknowledged the controversy over gaming and asked, in part, that the bill be amended to prohibit "all gaming, gambling, lottery, or bingo, as defined by the laws and administrative regulations of the State of Texas, . . . on the Tribe's reservation or tribal land." Ysleta del Sur Pueblo Resolution No. TC-02-86, *reprinted in Ysleta del Sur*, 36 F.3d at 1328 n.2.

In accordance with the Tribe's request, the bill was amended again to prohibit "[a]ll gaming, gambling, lottery or bingo as defined by the laws and administrative regulations of the State of Texas . . . on the tribe's reservation and on tribal lands." 131 CONG. REC. S13635 (daily ed. Sept. 24, 1986) (text of H.R. 1344, § 107(a) as passed by the Senate). That version passed the Senate. *Id.* However, the very next day, before it could be reconciled with the House version, the Senate vitiated its passage of the bill, effectively killing any restoration of the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in the 99th Congress. 131 CONG. REC. S13735 (daily ed. Sept. 25, 1986).

A new version of the bill was introduced in January 1987, and subsequently was passed by the House; it, like the earlier Senate bill, would have expressly prohibited all gaming on the Tribe's reservation and tribal lands. 133 CONG. REC. H13735 (daily ed. Apr. 21, 1987). Later that year, the bill was amended again by the Senate, which deleted the express prohibition against gaming. 1987 Senate Report, *supra* note 5, at 3 (text of H.R. 318, § 107(a) as amended by the Senate). The Senate's version of H.R. 318 ultimately was enacted, with the gaming provisions contained in Section 107. *See* Restoration Act, *supra* note 2, § 107.

Attachment A

When the Restoration Act was enacted in 1987, Texas law generally prohibited gaming, with the exception of charitable bingo on a local-option basis.[25] In the Restoration Act, the first sentence of Section 107(a) makes the State's substantive gaming laws applicable on the Tribe's lands. Similarly, the second sentence extends to the Tribe's lands the penalties provided in State law for engaging in prohibited gaming. The final sentence explains, at least in part, why Congress included gaming provisions in the Act. Thus, through Section 107(a), Congress provided for a limited application of State gaming law on the Tribe's lands:

> SEC. 107. GAMING ACTIVITIES
>
> (a) IN GENERAL.–All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accordance with the Tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.[26]

Despite the application of Texas law, however, Section 107(b) expressly states that"[n]othing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."[27] In other words, the Tribe retained civil and criminal regulatory jurisdiction over its reservation and tribal lands, except to the extent expressly divested by the following subsection of the Act.

Finally, although another section of the Restoration Act generally granted the State "civil and criminal jurisdiction within the boundaries of the reservation,"[28] Section 107(c) expressly provides that federal courts, not state courts, are the forum in which the State may seek to enforce alleged violations of Section 107(a):

> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.–Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.[29]

---

[25] Tex. Const. art. 3, § 47(b)-(c) (as amended 1980). The Texas Constitution provided that "[t]e Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in the State, as well as the sale of tickets in lotteries, gift enterprises, or other evasions involving the lottery principle, established or existing in other States." *Id.* at art. 3, § 47(a). In addition, wagering on dog and horse racing in Texas had been illegal since 1937. Texas Legislative Council, Info. Rep. No. 87-2: Analysis of Proposed Constitutional Amendments and Referenda Appearing on the November 3, 1987, Ballot, at 75 (Sept. 1987).

[26] Restoration Act, *supra* note 2, at § 107(a) (codified at 25 U.S.C. § 1300g-6(a)).

[27] *Id.* at § 107(b) (codified at 25 U.S.C. § 1300g-6(b)).

[28] *Id.* at § 105(f) (codified at 25 U.S.C. § 1300g-4(f)) (granting Texas civil and criminal jurisdiction equivalent to that granted by Public Law 83-280, 67 Stat. 588 (1953), as amended by the Indian Civil Rights Act, Pub. L. 90-284, 82 Stat 77 (1968).

[29] *Id.* at § 107(c) (codified at 25 U.S.C. § 1300g-6(c)).

C. Gaming in Texas

Almost immediately after the Restoration Act was enacted, Texas began to open itself up to gaming. On November 3, 1987—less than three months after the Restoration Act was enacted—the people of Texas by referendum ratified the Legislature's enactment of the Texas Racing Act, allowing for pari-mutuel dog and horse racing.[30] Two years later, the Texas Constitution was amended to allow for "charitable raffles."[31] A more momentous change occurred in 1991, when the Texas Constitution was amended to permit certain lotteries.[32] Texas now offers a variety of lottery games, including national Powerball and MegaMillions.[33] Thus, while charitable bingo was the only gaming permitted in Texas at the time the Restoration Act was enacted, a little more than four years later the State had dramatically expanded gaming to include raffles, pari-mutuel racing, and a state lottery. In Fiscal Year 2014, Texas Lottery sales totaled almost $4.4 billion, returning more than $1.2 billion to the State's coffers.[34] In addition, races at Texas racetracks generated more than $438 million in wagers during calendar year 2014.[35]

D. The Indian Gaming Regulatory Act

The expansion of State-sanctioned gaming in Texas was not the only change to the legal landscape in the years immediately following enactment of the Restoration Act. On October 19, 1988, a little more than one year after it enacted the Restoration Act, Congress enacted the IGRA. Among the IGRA's stated purposes were to establish a new nationwide regulatory framework for tribal gaming on Indian lands within a tribe's jurisdiction,[36] and to promote "tribal economic development, self-sufficiency, and strong tribal governments."[37]

---

[30] The Texas Racing Act ("Racing Act") was enacted by the Texas Legislature in 1986. *Id.* However, the Racing Act provided that wagering could be conducted pursuant to its provisions only after it was ratified by the State's voters. *Id.* On November 3, 1987, the voters in Texas approved the Racing Act by a wide margin. Bill Christine, *Texas Voters Finally End a 50-year Ban Against Betting on Horse Races*, L.A. TIMES, Nov. 5, 1987, *available at* http://articles.latimes.com/1987-11-05/sports/sp-18911_1_horse-racing-notes (last visited July 9, 2015).

[31] Tex. Const. art. 3, § 47(d) (as amended 1989).

[32] Tex. Const. art. 3, § 47(3) (as amended 1991).

[33] *See* Texas Lottery, *Play the Games of Texas*, http://www.txlottery.org/export/sites/lottery/Games/index.html (last viewed July 9, 2015).

[34] Texas Lottery Commission, *Summary of Financial Information* (undated; audited through FY2014, unaudited through March 2015), *available at* http://www.txlottery.org/export/sites/lottery/Documents/financial/Monthly-Transfer-Document.pdf (last visited July 9, 2015).

[35] Texas Racing Commission, *Texas Pari-Mutuel Racetracks Wagering Statistics Comparison Report on Total Wagers Placed in Texas & on Texas Races For the Period: 01/01/13 – 12/31/13 to 01/01/14 – 12/31/14* at 1 (undated), *available at* http://www.txrc.texas.gov/agency/data/wagerstats/prevYr/20141231.pdf (last visited July 9, 2015).

[36] *See* 25 U.S.C. §§ 2701-2702 (Congress's findings and declaration of policy), § 2710 (governing tribal gaming ordinances); S. Rep. No. 100-446, at 6 (1988) [hereinafter "1988 Senate IGRA Report"] (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"); *see also Wells Fargo Bank v. Lake of the Torches*, 658 F.3d 684, 687 (7th Cir. 2011) (finding that among the IGRA's "stated goals was "to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes'" (quoting 25 U.S.C. § 2702(1)). *Cf. Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 689 (1st Cir. 1994) [hereinafter "*Narragansett*"] ("The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands.")

[37] 25 U.S.C. § 2702(1).

Attachment A

The vast majority of tribal gaming in the United States is governed under the IGRA's framework, which has proven to be enormously successful. The IGRA helped spur dramatic growth in Indian gaming, from annual revenues of approximately $100 million in 1988 to approximately $28.5 billion in 2014.[38] Recent scholarship demonstrates that, as Congress intended, Indian gaming has helped strengthen tribal economies, increase household income for reservation Indians, and reduce reservation poverty and unemployment rates.[39]

E. Gaming by the Ysleta del Sur Pueblo and Resulting Litigation

Just as the public policy of the State of Texas with regard to gaming evolved in the years after the Restoration Act was enacted, so, too, did the public policy of Tribe. However, the Tribe's efforts to pursue gaming within the confines of the law have been thwarted at every turn by the State of Texas.

1. Litigation over the Application of the IGRA

On May 6, 1992, after Texas dramatically expanded the scope of gaming under State law, and after Congress enacted the IGRA to provide a comprehensive regulatory scheme for tribal gaming, the Tribe adopted a bingo ordinance.[40] The Tribe submitted Tribal Bingo Ordinance 00492 to the NIGC for approval, and on October 19, 1993, the ordinance was approved by the Chairman of the NIGC.[41] In February 1992, the Tribe petitioned the Governor of Texas, pursuant to the IGRA, to begin negotiations to enter a class III gaming compact.[42] The Governor, however, refused on the grounds that the State's law and public policy prohibited her from negotiating such a compact.[43] As a result, the Tribe sued to compel the State under the provision of the IGRA that allowed the Federal courts to order a state to the negotiating table.[44] The U.S. Court of Appeals for the Fifth Circuit held that the Restoration Act did not give the Tribe authority to bring such a suit and that the IGRA did not apply.[45]

---

[38] *Compare* 1988 Senate IGRA Report, *supra* note 36, at 22 (Indian gaming "generate[s] more than $100 million in annual revenues to tribes"), *with* Nat'l Indian Gaming Comm'n, *Gaming Revenue Reports*, *available at* http://www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited Aug. 21, 2015) (Indian gaming revenue $28.5 billion in Fiscal Year 2014).

[39] Randall K.Q. Akee *et al.*, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 185-87, 196-99 (2015). In addition, the growth of Indian gaming in the wake of the IGRA has also proved to be a boon to local and state governments. *Id.* at 199-203.

[40] Ysleta del Sur Tribal Bingo Ordinance No. 00492 (as amended on Oct. 16, 1992; April 15, 1993; July 22, 1993; and Oct. 5, 1993), *available at* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/ysletadelsurpueblotrbe/ordappr101993.pdf.

[41] Letter from Anthony J. Hope, Chairman, NIGC, to Tom Diamond, counsel to the Ysleta del Sur Pueblo (Oct. 19, 1993).

[42] *Ysleta del Sur*, 36 F.3d at 1331.

[43] *Id.*

[44] 25 U.S.C. § 2710(d)(7)(B)(iii), *abrogated by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[45] *Ysleta del Sur*, 36 F.3d 1325. The Fifth Circuit's opinion in *Ysleta del Sur*, which was filed approximately seven months after the First Circuit filed its opinion in *Narragansett*, is discussed in greater depth in Part II, *infra*.

Attachment A

The question before the Fifth Circuit was whether the IGRA permitted the Tribe to sue the State for refusing to negotiate a Class III gaming compact.[46] The Fifth Circuit held that the Restoration Act, and not the IGRA, governed the dispute and, finding nothing in the Restoration Act that waived the State's Eleventh Amendment immunity, the court reversed and remanded with instructions to dismiss the Tribe's suit.[47]

First, after a lengthy review of the Restoration Act's legislative history and the *Cabazon* decision,[48] the Fifth Circuit held that "Congress -- and the Tribe -- intended for Texas' gaming laws *and regulations* to operate as surrogate federal law on the Tribe's reservation in Texas."[49] Next, after finding that the Restoration Act "establishes a procedure for enforcement of § 107(a) which is fundamentally at odds with the concepts of IGRA," the Fifth Circuit held that the IGRA did not effect a partial repeal of the Restoration Act.[50] The court observed that the IGRA did not expressly repeal conflicting sections of the Restoration Act, and that "[t]he Supreme Court has indicated that 'repeals by implication are not favored.'"[51] The court then observed that implied repeals are especially disfavored when it is suggested that a general statute has impliedly repealed a specific statute,[52] and opined that, with regard to gaming, the Restoration Act is a specific statute applying to two specific tribes in a particular state, while the IGRA is a general statute.[53] The court further asserted that two provisions of the IGRA that reference existing federal law demonstrate that that the IGRA was not intended to trump statutes such as the Restoration Act.[54] Finally, the court noted that Congress in 1993 expressly exempted the Catawba Tribe of Indians ("Catawba") in South Carolina from the IGRA, thereby "evidencing in our view a clear intension on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[55] Having concluded that the IGRA does not effect an implied repeal of contrary provisions of the Restoration Act, the Fifth Circuit wrote: "To borrow IGRA terminology, the Tribe has already made its 'compact' with the state of Texas, and the Restoration Act embodies that compact."[56] The court suggested the only way for the Tribe to game under IGRA would be to petition Congress to amend or repeal the Restoration Act.[57]

---

[46] *Ysleta del Sur*, 36 F.3d at 1327.

[47] *Id.* at 1327, 1335-36.

[48] *Id.* at 1327-31.

[49] *Id.* at 1334 (emphasis added).

[50] *Id.* at 1334-35.

[51] *Id.* at 1335 (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987)).

[52] *Id.* (citing *Crawford Fitting*, 482 U.S. at 445).

[53] *Id.*

[54] *Id.* (citing 25 U.S.C. § 2701(5) ("the Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law"); *id.* § 2710(b)(1)(A) (tribes may engage in Class II gaming if, *inter alia*, "such gaming is not otherwise specifically prohibited on Indian lands by Federal law").

[55] *Id.*

[56] *Id.* Having concluded that the IGRA did not apply, and that the Restoration Act contained no language abrogating the State's Eleventh Amendment immunity from suit, the Fifth Circuit held that the Eleventh Amendment barred the Tribe's suit and remanded to the district court with instructions to dismiss. *Id.* at 1335-36.

[57] *Id.* at 1335.

2. Litigation under the Restoration Act

Meanwhile, the Tribe opened the Speaking Rock Casino and Entertainment Center ("Speaking Rock") on its reservation in 1993.[58] Speaking Rock began as a bingo hall, but evolved into "a full-scale casino offering a wide variety of gambling activities played with cards, dice, and balls."[59] In 1999, after Speaking Rock had been open and operating for approximately six years, the State sued under Section 107(c) of the Restoration Act.[60] On September 21, 2001, the district court issued an injunction that "had the practical and legal effect of prohibiting illegal as well as legal gaming activities by the [Tribe]."[61] After an unsuccessful appeal, the Tribe in February 2002 ceased operating those gaming activities prohibited by the injunction.[62] In May 2002, at the request of the Tribe, the district court modified its injunction to allow the Tribe to offer certain specified sweepstakes promotions, but denied the Tribe's request to offer its own sweepstakes.[63] The following year, the Tribe requested permission to offer a sweepstakes promotion selling prepaid phone cards that provided patrons access to "sweepstakes validation terminal[s]"; that request, too, was denied by the district court.[64]

In 2008, upon discovering that the Tribe was operating devices at Speaking Rock that "resembled traditional eight-liner gambling devices and were operated by a card purchased with cash," the State accused the Tribe of violating the injunction and made a motion that the Tribe be held contempt of court.[65] The Tribe sought further clarification of the injunction and a declaration that its "Texas Reel Skill" sweepstakes game did not violate the injunction.[66] In August 2009, the district court granted the State's motion, issued a contempt order, and refused to declare that the Tribe's "Texas Reel Skill" game was legal.[67] A week later, the Tribe sought permission to operate yet another sweepstakes game, which the district court denied in October 2010.[68] The Tribe, however, did not cease operation of its sweepstakes games, and by 2012 it had opened a second sweepstakes operation at the Socorro Entertainment Center ("Socorro").[69] The State made another motion that the Tribe be held in contempt of court in September 2013, and amended that motion multiple times before withdrawing it in favor of a renewed motion for contempt made on March 17, 2014.[70] After holding a two-day evidentiary hearing and accepting more than a 1.5 million pages of documents into evidence,[71] the district court on March 6, 2015,

---

[58] *State v. Ysleta del Sur Pueblo*, No. EP-99-CV-320-KC, 2015 U.S. Dist. LEXIS 28026, at *6 (W.D. Tex. Mar. 6, 2015) (hereinafter, "*State v. Ysleta del Sur Pueblo*").

[59] *Id.*

[60] *Id.* at 3.

[61] *Id.* at *6-7 (internal quotation and citation omitted; alteration in original).

[62] *Id.* at *8.

[63] *Id.* at *9-10.

[64] *Id.* at *11.

[65] *Id.* at *11-12.

[66] *Id.* at *12-13.

[67] *Id.* at *12-14.

[68] *Id.* at *14-15.

[69] *Id.* at *15.

[70] *Id.* at *15-16.

[71] *Id.* at *16-17.

held the Tribe in contempt and ordered that it cease all sweepstakes operations within sixty days or face civil penalties of $100,000 per day, unless the Tribe submitted "a firm and detailed proposal setting out a sweepstakes promotion that operates in accordance with federal and Texas law," the submission of which would result in a stay of the contempt sanctions while the court considered the Tribe's proposal and the State's response.[72] On May 5, 2015, the Tribe submitted its proposal,[73] which the State has opposed.[74]

F. The Tribe's Amended Gaming Ordinance and the NIGC Request

On August 17, 2015, the Tribe resubmitted[75] to the NIGC an amendment to its gaming ordinance.[76] The NIGC has asked the Solicitor's Office for clarification as to the Tribe's "eligibility to engage in Class II gaming under the [IGRA] in light of the [Restoration Act] and the Fifth Circuit Court of Appeal's interpretation of it in *Ysleta del Sur Pueblo v. State of Texas*."[77]

II. ANALYSIS

Congress has not spoken directly to the issue of whether the Restoration Act or the IGRA governs gaming on the Tribe's reservation and tribal lands. The Restoration Act neither expressly anticipates and provides for the possibility that subsequent legislation might render certain sections of it obsolete, nor does it expressly insulate its provisions from subsequently enacted contrary legislation. Likewise, the IGRA does not make any direct or indirect references to the Restoration Act, the Tribe, or the State. As explained in greater detail throughout our analysis, we recognize that the Fifth Circuit in *Ysleta del Sur* held that the Restoration Act, and not the IGRA, governs gaming on the Tribe's lands.[78] However, the Department was not a party to the *Ysleta* litigation and is not bound by the Fifth Circuit's interpretation of the Restoration Act.[79]

---

[72] *Id.* at *118-20.

[73] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 513 (May 5, 2015).

[74] *State v. Ysleta del Sur Pueblo*, ECF Docket No. 514 (June 5, 2015).

[75] The Pueblo previously submitted this amendment to the NIGC Chairman on March 21, 2014; June 6, 2014; August 29, 2014; November 24, 2014; February 24, 2015; and May 19, 2015. 2015 NIGC Letter, *supra* note 1, at 1.

[76] Letter from Randolph H. Barnhouse, Counsel for Ysleta del Sur, to Jonodev Osceola Chaudhuri, Chairman, NIGC (Aug. 17, 2015).

[77] 2015 NIGC Letter, *supra* note 1, at 1 (footnotes omitted).

[78] *See generally Ysleta del Sur*, 36 F.3d 1325 (5th Cir. 1994).

[79] An agency charged with implementing a statute may "choose a different construction" of the statute than that embraced by a circuit court, "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). With regard to the Restoration Act, the Department is the executive agency charged with administering the statute. Restoration Act, *supra* note 2, § 2 ("The Secretary of the Interior or his designated representative may promulgate such regulations as may be necessary to carry out the provisions of this Act."); *cf. Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1996) (holding that administration of a tribe's settlement act is a "role that belongs to the Secretary of the Interior"). *See also Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir. 1987) ("Congress has delegated to the Secretary [of the Interior] broad authority to manage Indian affairs" (citing 25 U.S.C. § 2)). Therefore, the Department may choose a different interpretation of the Restoration Act than the interpretation chosen by the Fifth Circuit. Here, the Department does so.

Attachment A

In interpreting a statute that we are charged with administering, we seek to effect the intent of the Congress that enacted the statute.[80] Agency interpretation of a statute follows the same two-step analysis that courts follow when reviewing an agency's statutory interpretation. At the first step, the agency must answer "whether Congress has spoken directly to the precise question at issue" and, if the statute is clear, then the agency must give effect to "the unambiguously expressed intent of Congress."[81] If, however, the statute is "silent or ambiguous," as are both the Restoration Act and the IGRA, then the agency must base its interpretation on a "reasonable construction" of the statute.[82]

When confronted with a statute that was enacted for the benefit of Indians, as were both the Restoration Act and the IGRA, if that statute contains ambiguities we are guided by an additional principle:: "statutes passed for the benefit of . . . Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[83]

Employing both the standard rules of statutory construction and the Indian canon, and applying the Department's expertise in the field of Indian affairs,[84] the Department interprets the IGRA as impliedly repealing the gaming provisions of the Restoration Act. Therefore, we conclude that the IGRA, and not the Restoration Act, governs gaming on the Tribe's reservation and tribal lands.

Our interpretation contains four distinct subparts. First, having analyzed both the text and the legislative history of the IGRA, employing both the standard rules of statutory construction and the Indian canon, we concur in your conclusion[85] that Congress intended for the IGRA to apply to the Tribe. Second, we conclude that the Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA and, therefore, that the IGRA governs gaming on the Tribe's reservation and tribal lands. Third, we conclude that Section 107 of the Restoration Act is repugnant to the IGRA and, therefore, that the statutes cannot be harmonized. Finally, we conclude that in this conflict the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act.

A. Both the text of the IGRA and its legislative history demonstrated that Congress intended for the IGRA to apply to the Tribe.

The IGRA "is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands."[86] Among the IGRA's "stated goals [was] to create a comprehensive regulatory framework 'for the operation of gaming by Indian tribes as a means of promoting tribal

---

[80] *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) ("The question whether federal law authorize[s] certain federal agency action is one of congressional intent.").

[81] *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

[82] *Id.* at 840.

[83] *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976).

[84] *Cherokee Nation v. United States*, 73 Fed. Cl. at 497 n.7 (2006) (observing that "the Secretary [of the Interior] certainly has vast expertise in interpreting Indian statutes").

[85] *See* 2015 NIGC Letter, *supra* note 1, at 2. Although we have not seen your analysis, we reach the same conclusion and, therefore, concur.

[86] *Narragansett*, 19 F.3d at 689.

economic development, self-sufficiency, and strong tribal governments.'"[87] The text of IGRA, itself, contains no express exemption for the Tribe, or for any other tribe; rather, the IGRA is written broadly to encompass all federally recognized Indian tribes.[88] Thus, "[b]y its own terms, the [IGRA], if taken in isolation, applies to any federally recognized Indian tribe that possesses powers of self-governance."[89] Therefore, given IGRA's broad purposes, and the fact that nothing in the plain language of IGRA expressly excludes the Tribe, we conclude that, on its face, IGRA applies to the Tribe.

The Fifth Circuit, however, pointed to two sections of the IGRA that make reference to "other federal law," and that it believed demonstrated Congress's intent that the IGRA not supersede the gaming provisions of the Restoration Act and similar statutes. Noting that the IGRA was enacted scarcely a year after the Restoration Act, the court wrote that Congress "explicitly stated in two separate provisions of the IGRA that IGRA should be considered in light of other federal law,"[90] the Fifth Circuit interpreted these two sections as providing that the IGRA does not apply where Congress had previously spoken to gaming, as it had in the Restoration Act.[91]

We interpret these provisions differently than the Fifth Circuit. The Senate Report on the IGRA explains that this language instead "refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175."[92] In other words, the language that the Fifth Circuit relied upon in finding that the text of the IGRA expressly exempted tribes for whom prior Federal law addressed gaming was, instead, intended to make clear that the IGRA did not legalize certain *games* that were already illegal as a matter of Federal law.

The legislative history of the IGRA contains no specific evidence that Congress sought to exclude the Tribe from the IGRA's ambit. The 1988 Senate IGRA Report contains no specific

---

[87] *Wells Fargo Bank*, 658 F.3d at 687 (quoting 25 U.S.C. § 2702(1)).

[88] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government.")

[89] *Passamaquoddy*, 75 F.3d at 788 (citing 25 U.S.C. § 2703(5)).

[90] *Ysleta del Sur*, 36 F.3d at 1335 (citing 25 U.S.C. § 2701(5) ("The Congress finds that – (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands *if the gaming is not specifically prohibited by Federal law* and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (emphasis added)); and 25 U.S.C. § 2701(b)(1)(A) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (*and such gaming is not otherwise specifically prohibited on Indian lands by Federal law*)" (parenthetical in original, emphasis added))).

[91] *Id.*

[92] 1988 Senate IGRA Report, *supra* note 36, at 12. The 1988 Senate IGRA Report also explains that the IGRA was not intended to "supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act and the [Maine] Indian Claim Settlement Act (citations omitted). *Id.* This language does not change our analysis. The Restoration Act expressly provides that it *is not* a grant of Federal authority or jurisdiction with regard to gaming, but is instead merely an extension of the State's substantive gaming law with a specified federal court remedy. Restoration Act, *supra* note 2, at § 107(a) (applying State's substantive gaming law), § 107(b) (no grant of jurisdiction to the State), § 107(c) (remedy in federal court).

Attachment A

references to the Tribe, the State of Texas, or the Restoration Act.[93] That Report does explain that Congress did not intend for the IGRA to "supersede any specific restriction or grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute," citing as a specific example the Maine Indian Claims Settlement Act.[94] However, the Restoration Act contains no "specific restriction . . . of Federal authority," and although Section 105(f) provides for a general grant of jurisdiction to the State, Section 107(c) specifically states that that grant of jurisdiction *does not* give the State jurisdiction over gaming.[95]

The Fifth Circuit concluded that Congress's 1993 decision to exclude the Catawba in South Carolina from the IGRA's ambit was evidence of "a clear intention on Congress' part that IGRA is not to be the one and only statute addressing the subject of gaming on Indian lands."[96] However, the actions of the 103[d] Congress shed no light whatsoever on the intentions of the 100[th] Congress at the time that it enacted the IGRA; rather, the fact that specific legislation was required to place the Catawba outside the IGRA's ambit in South Carolina strongly suggests that, absent an explicit act such as that taken with the Catawba, a tribe must be presumed to fall within the IGRA's ambit. Consequently, because no act of Congress expressly places the Tribe outside of the IGRA's scope, we interpret the IGRA as including the Tribe within its ambit.

Therefore, we conclude that the gaming on the Tribe's reservation and Indian lands falls within the ambit of the IGRA.

B. The Tribe possesses and exercises jurisdiction over its reservation and tribal lands sufficient to trigger the operation of the IGRA.

The IGRA is not applicable to all land owned by a tribe. First, the IGRA provides for gaming only on "Indian lands," a category which includes: (1) land located within the exterior boundaries of a tribe's reservation; and (2) trust land and restricted fee land over which a tribe exercises governmental authority.[97] Second, the IGRA requires that a tribe possess legal

---

[93] *See generally* 1988 Senate IGRA Report, *supra* note 36.

[94] *Id.* at 12 (citations omitted). The Maine Indian Claims Settlement Act provides in part that any subsequently enacted Federal laws "for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine." 25 U.S.C. § 1735.

[95] *Compare* Restoration Act, *supra* note 2, *with* Maine Indian Claims Settlement Act, 25 U.S.C. § 1735. The Restoration Act – enacted by the very same Congress that enacted the IGRA scarcely a year later – contains no language whatsoever that would preserve its gaming provisions in the face of subsequently enacted Federal law, such as the IGRA.

[96] *Ysleta del Sur*, 36 F.3d at 1135.

[97] The IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). The NIGC's regulations further define "Indian lands" and specify that in order for land outside of a tribe's reservation to qualify as Indian lands the tribe must exercise governmental authority over that land. 25 C.F.R. § 502.12 (defining "Indian lands" as "land within the limits of an Indian reservation," "land over which an Indian tribe exercises governmental power . . . [and is] [h]eld in trust by the United States for the benefit of any Indian tribe or individual," or "land over which an Indian tribe exercises

jurisdiction over the land.[98] There is a presumption that tribes possess legal jurisdiction over land located within the exterior boundaries of their own reservations.[99] Where there is a question as to the tribe's jurisdiction, courts have found that a tribe must meet two requirements[100]: First, the provisions of the IGRA related to Class I and class II gaming require that a tribe must *have jurisdiction* over the land;[101] second, the provision defining the elements of "Indian lands" requires that a tribe must *exercise governmental power* over the land.[102]

Courts have found that possession of legal jurisdiction over land is a threshold requirement to the exercise of governmental power required for trust and restricted fee land.[103] Whether a tribe possess *legal jurisdiction* over a particular parcel of land often hinges on construing settlement or restoration acts that limit the tribe's jurisdiction[104] or on a determination of which tribe possesses jurisdiction over a particular parcel of land.[105] A showing of *governmental power* requires a concrete manifestation of authority and is a factual inquiry.[106] For trust or restricted fee land to qualify as Indian lands over which a tribe possess jurisdiction, the two requirements of having jurisdiction and exercising governmental authority must both be met. Once a tribe has established that its land qualifies as Indian lands and that the tribe possesses jurisdiction over that

---

governmental power . . . [and is] [h]eld by an Indian tribe or individual subject to restriction by the United States against alienation").

[98] 25 U.S.C. § 2710(b)(1) (providing that, subject to enumerated criteria, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction"); *id.* at § 2710(d)(1)(A)(i) (providing that, subject to enumerated criteria, "Class III gaming activities shall be lawful on Indian lands only if such activities are—(A) authorized by an ordinance or resolution that—(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands").

[99] Letter from Michael J. Berrigan, Associate Solicitor, Division of Indian Affairs, to Jo-Ann Shyloski, Associate General Counsel, NIGC, at 4-5 n.26 and decisions cited therein (Aug. 23, 2013) [hereinafter "2013 Wampanoag Opinion Letter"], *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f20130823AquinnahSettlementActInterpretationsigned.pdf&tabid=120&mid=957.

[100] *Narragansett*, 19 F.3d at 701.

[101] *Id.* (citing 25 U.S.C. § 2710(b)(1)).

[102] *Id.* (citing 25 U.S.C. § 2703(4)).

[103] *See Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001) ("[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land."); *Narragansett*, 19 F.3d at 701-03 (1st Cir. 1994), *superseded by statute*, 25 U.S.C. § 1708(b), *as stated in Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335 (D.C. Cir. 1998); *Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (stating that a tribe must have jurisdiction in order to exercise governmental power); *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996) ("[T]he NIGC implicitly decided that in order to exercise governmental power for purposes of 25 U.S.C. § 2703(4), a tribe must first have jurisdiction over the land.").

[104] *See, e.g., Narragansett*, 19 F.3d at 701-02 (finding that Narragansett Indian Tribe possessed the requisite jurisdiction to trigger the IGRA in light of the tribe's settlement act); 2013 Wampanoag Opinion Letter, *supra* note 99, at 5 n.31 and authorities cited therein.

[105] Letter from Lawrence S. Roberts, General Counsel, NIGC, et al., to Tracie Stevens, Chairwoman, NIGC, at 10-13 (May 24, 2012) (determining that Muscogee (Creek) Nation had jurisdiction over land in question and that the Kialegee Tribal Town had not demonstrated that it had legal jurisdiction), *available at* http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2freadingroom%2fgameopinions%2fkialegeetribaltownopinion52412.pdf&tabid=120&mid=957; 2013 Wampanoag Opinion Letter, *supra* note 99, at 5-6 n.32 and authorities cited therein.

[106] *Narragansett*, 19 F.3d at 703.

Attachment A

land—making it eligible for Indian gaming—the tribe has the exclusive right to regulate gaming on that land, and a state can extent its jurisdiction only through a tribal-state compact.[107]

Approximately twenty years ago, the First Circuit in *Rhode Island v. Narragansett Indian Tribe*[108] determined whether a tribe's settlement act prohibited gaming. It created a two-step analysis, first asking whether the tribe possesses the requisite jurisdiction for the IGRA to apply to the tribe's lands; and next asking whether the tribe's settlement act and the IGRA can be read together, or whether the IGRA impliedly repealed the settlement act's gaming provisions.[109] This office has since used the *Narragansett* framework to evaluate whether the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 prohibited the Wampanoag Tribe of Gay Head (Aquinnah) from gaming.[110] Because the settlement act at issue in *Narragansett* and the Restoration Act at issue here raise similar questions with respect to gaming and the application of the IGRA, we employ that framework here.[111]

In applying the *Narragansett* court's framework to the present question, we begin by asking whether the Ysleta del Sur Tribe possesses jurisdiction over its reservation and tribal lands sufficient to trigger the application of the IGRA.[112] To determine whether the Tribe possesses the requisite jurisdiction for the IGRA to apply, we must first determine what the IGRA's reference to "jurisdiction" means.[113] A basic tenet of Indian law dictates that tribes retain attributes of sovereignty, and therefore jurisdiction, over their lands and members.[114] In *Narragansett*, the court explained that the jurisdiction required for the IGRA to apply is derived from a tribe's retained rights flowing from their inherent sovereignty.[115] Against that backdrop, we construe the IGRA's language.

As noted above, statutory interpretation begins with the plain meaning of the language itself. With respect to class II gaming, the IGRA states that "[a]n Indian tribe may engage in, or license and regulate, class II gaming on *Indian lands* within such tribe's jurisdiction."[116] With regard to class III gaming, the IGRA explains that "[a]ny Indian tribe having jurisdiction over the *Indian*

---

[107] 25 U.S.C. § 2701(5) ("The Congress finds that . . . Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

[108] 19 F.3d 685 (1st Cir. 1994).

[109] *Id.*

[110] 2013 Wampanoag Opinion Letter, *supra* note 99, at 4-5 n.26 and decisions cited therein.

[111] *See generally id.* In *Narragansett*, the First Circuit held that the Narragansett Indian Tribe ("Narragansett Tribe") possessed and exercised jurisdiction under its settlement act that was sufficient to trigger the application of the IGRA. 19 F.3d at 700-03. Upon concluding that the IGRA was triggered, the court examined the interplay between the settlement act and the IGRA and concluded that the IGRA effected an implied partial repeal of portions of the settlement act. *Id.* at 703-05.

[112] 2013 Wampanoag Opinion Letter, *supra* note 99, at 7-15.

[113] *Id.* at 7.

[114] The U.S. Supreme Court has consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *Cabazon*, 480 U.S. at 207 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

[115] 19 F.3d at 701 ("We believe that jurisdiction is an integral aspect of retained sovereignty.").

[116] 25 U.S.C. § 2710(b)(1) (emphasis added).

Attachment A

lands upon which a class III gaming activity is being conducted" must enter into a compact with the state.[117] It further requires that a gaming ordinance authorizing class III gaming be "adopted by the governing body of the Indian tribe having jurisdiction over *such lands*."[118] In each of the IGRA's three references to its jurisdictional requirement, the statute clearly states that a tribe must possess jurisdiction over its lands.[119]

We, like the First Circuit, also view as important the amount of jurisdiction a tribe must possess in order to trigger application of the IGRA. Tribes possess aspects of sovereignty not ceded by treaty or withdrawn by statute or by implication as a necessary result of their dependent status.[120] In other words, tribes are presumed to have jurisdiction over their land unless it has been ceded or withdrawn. When Congress enacts a status depriving a tribe of jurisdiction, it must do so explicitly.[121] Furthermore, "acts diminishing the sovereign rights of Indian [t]ribes should be strictly construed."[122] This statutory rule is bolstered by the Indian canon of construction.

We require Congress's explicit divestiture of tribal jurisdiction to avoid the IGRA's application to Indian lands, as did the *Narragansett* court.[123] In other words, unless a tribe has been completely divested of jurisdiction, the IGRA applies. A mere grant of state jurisdiction is not enough to find the State has exclusive jurisdiction over the land.[124]

Here, the Restoration Act does not confer upon the State *jurisdiction* over gaming on the Tribe's reservation and tribal lands, but instead merely provides that "gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe."[125] This merely codified the distinction, set forth in *Cabazon* and affirmed in the IGRA, between *regulated* gaming activities, which a tribe may engage in pursuant to the IGRA, and *prohibited* gaming activities, which a tribe may engage in only under the terms of a compact

---

[117] *Id.* § 2710(d)(3)(A) (emphasis added).

[118] *Id.* § 2710(d)(1)(A)(i) (emphasis added).

[119] 2013 Wampanoag Opinion Letter, *supra* note 99, at 8 n.57 and authorities cited therein.

[120] *Narragansett*, 19 F.3d at 701 (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

[121] *Id.* at 702 ("Since the settlement Act does not *unequivocally articulate* an intent to deprive the Tribe of jurisdiction, we hold that its grant of jurisdiction to the state is non-exclusive" (emphasis added)); Letter from Michael J. Anderson, Acting Assistant Secretary – Indian Affairs, to Patricia A. Marks, Attorney, Wampanoag Tribe of Gay Head, at 3 (Sept. 5, 1997) [hereinafter "1997 AS-IA Letter"] (pointing to "long-standing Executive and Congressional policies favoring the strengthening of tribal self-government, and disfavoring the implicit erosion of tribal sovereignty" and explaining that "[i]n this context, the U.S. Supreme Court has held that Congressional intent to delegate exclusive jurisdiction to a state must be clearly and specifically expressed" (citing *Bryan*, 426 U.S. at 392)).

[122] *Narragansett*, 19 F.3d at 702.

[123] *Id.* at 702. The Assistant Secretary also has emphasized this point. 1997 AS-IA Letter, *supra* note 121, at 4 ("Had Congress desired to defeat concurrent tribal jurisdiction on lands located outside of the Town of Gay Head, it would have either provided for 'exclusive' state and local jurisdiction, or it would have included limitations on tribal jurisdiction.").

[124] 2013 Wampanoag Opinion Letter, *supra* note 99, at 9; *Narragansett*, 19 F.3d at 702 (because the Settlement Act's "grant of jurisdiction to the state is non-exclusive," the Narragansett Tribe "retain[s] that portion of jurisdiction they possess by virtue of their sovereign existence as a people – a portion sufficient to satisfy the Gaming Act's 'having jurisdiction' prong.").

[125] Restoration Act, *supra* note 2, § 107(a).

Attachment A

with a state. At most, Section 107(a) functions as a choice-of-law provision, employing the State's substantive gaming law to set the bounds of permissible gaming on the Tribe's reservation and tribal lands. Under either reading of the Restoration Act, Section 107(a) diminishes the Tribe's sovereign right to enact its own gaming laws; however, it does not diminish the Tribe's jurisdiction, on its reservation and tribal lands, to regulate gaming activities undertaken in accordance with the State's substantive gaming laws.

In addition, the application of the State's gaming laws on the Tribe's reservation and tribal lands must be strictly construed, under basic tenets of Indian law and the *Narragansett* framework. No provision of the Restoration Act expressly, or even impliedly, divests the Tribe of *regulatory* jurisdiction over its reservation and tribal lands. In fact, Section 107(b) of the Act provides: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Moreover, Section 107(c) of the Restoration Act provides that Federal courts "have exclusive jurisdiction over" alleged violations of Section 107(a), thereby impliedly divesting the Tribe only of its *adjudicatory* jurisdiction over gaming disputes that arise under the Act. Therefore, the Tribe retains nearly complete civil and criminal regulatory jurisdiction over its reservation and tribal lands, except for the narrow exception for Federal court jurisdiction provided in Section 107(c), which means that the State does not and cannot have exclusive jurisdiction over those lands.[126]

In addition, the Restoration Act's only grant of jurisdiction to the State, contained in Section 105(f), does not suggest that such State jurisdiction is exclusive. Instead, it merely provides that the State has civil and criminal jurisdiction on the Tribe's reservation and Indian lands consistent with Public Law 280, as amended by the Indian Civil Rights Act,[127] which does not extinguish the Tribe's inherent jurisdiction, but instead merely authorizes the State to exercise jurisdiction concurrent with that of the Tribe.[128] Section 105(f) does not use the words "exclusive" or

---

[126] Both the Assistant Secretary and this Office have observed that the gaming provisions of the Restoration Act differed markedly from those contained in the Massachusetts Indian Land Claims Settlement act. 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95; 1997 AS-IA Letter, *supra* note 121, at 5. Neither letter contained an in-depth analysis of the Restoration Act, and neither concluded that the Restoration Act completely divested the Tribe of jurisdiction over gaming on its reservation and tribal lands; rather, both letters simply observed that the differences in the two statutes provided a reason not to follow the Fifth Circuit's *Ysleta del Sur* opinion in their respective analyses of the Massachusetts Indian Land Claims Settlement Act. *Id.* Even if those Letters had concluded that the Restoration Act completely divested the Tribe of jurisdiction over its reservation and tribal lands, they would not preclude us from reconsidering that opinion in this Memorandum. *See Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.").

We are aware of the Assistant Secretary's statement that the Restoration Act "specifically prohibits all gaming activities which are prohibited by the laws of the State of Texas on the reservation and lands of the Ysleta del Sur Pueblo." 1997 AS-IA Letter, *supra* note 121, at 5; 2013 Wampanoag Opinion Letter, *supra* note 99, at 12-13 n.95 (quoting AS-IA Letter). This statement was not made in a detailed analysis of the Restoration Act, itself, but rather, in the Assistant Secretary's analysis of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, and therefore is not dispositive here.

[127] Restoration Act, *supra* note 2, § 105(f). Nothing in Section 105(f) suggests that the grant of jurisdiction to the State is exclusive.

[128] 1-6 Cohen's Handbook of Federal Indian Law § 6.04[3][c] (2012) ("The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched" (internal citations omitted)).

"complete" in describing the jurisdiction conferred upon the State in Section 105(f).[129] It does, however, use the word "exclusive" in Section 107(c) to describe the grant of jurisdiction to the federal courts for resolution of gaming disputes arising from the provisions of Section 107(a).[130] "Where 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[131]

In sum, the Restoration Act does not grant the State exclusive jurisdiction over the Pueblo's land and does not divest the Pueblo of its inherent jurisdiction. To the contrary, the Act specifically declares that it is not a grant of civil and criminal regulatory jurisdiction to the State.[132]

C. Section 107 of the Restoration Act and the IGRA are repugnant to each other.

Because the Tribe possesses sufficient jurisdiction to trigger application of the IGRA, we must determine whether the IGRA effected an implied repeal of any portion of the Restoration Act. When two federal statutes touch on the same subject matter, courts should attempt to give effect to both if they can be harmonized.[133] Therefore, "so long as the two statutes, fairly construed, are capable of coexistence, courts should regard each as effective."[134] However, if portions of the statutes are repugnant to each other, one must prevail over the other.[135] Even where the two statutes are not outright repugnant, "a repeal may be implied in cases where the later statutes covers the entire subject 'and embraces new provisions, plainly showing that it was intended as a substitute for the first act.'"[136] When a later statute impliedly repeals a former statute, a partial repeal is preferred and only the parts of the former statute that are in plain conflict with the later should be nullified.[137]

---

[129] *See Narragansett*, 19 F.3d at 702 ("omission of words such as 'exclusive' or 'complete'" in statute assigning jurisdiction was "meaningful"); *United States v. Cook*, 922 F.2d 1026, 1032-33 (2d Cir. 1991) (finding absence of terms "exclusive" or "complete" in Federal statute's grant of jurisdiction over offenses committed by or against Indians meant the statute only extended to the state jurisdiction concurrent with that of the Federal government).

[130] *Compare id.* § 105(f) (no use of "exclusive" or "complete"), *with* § 107(c) ("Notwithstanding section 105(f), the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) . . . ."). Section 107(c), would have been particularly important in the pre-IGRA environment in which the Restoration Act was negotiated and ultimately enacted. Because we conclude that the IGRA effects a partial implied repeal of the Restoration Act's gaming provisions, Section 107(c) is less relevant today.

[131] *Narragansett*, 19 F.3d at 702 (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)).

[132] The second part of the Indian lands determination, whether the tribe exercises governmental power, is a more fact-based determination than the jurisdictional question, and does not require construction of the Restoration Act; therefore, we leave this determination to the NIGC. 2013 Wampanoag Opinion Letter, *supra* note 99, at 14-15. Nonetheless, we note that, unlike the settlement act at issue in *Narragansett*, which expressly limited the Narragansett's *exercise* of jurisdiction over its settlement lands, *see* 25 U.S.C. § 1771e, the Restoration Act contains no language whatsoever limiting the Tribe's exercise of governmental power on its reservation or tribal lands.

[133] *Narragansett*, 19 F.3d at 703.

[134] *Id.* at 703 (citing *Traynor v. Tumage*, 485 U.S. 535, 547-48 (1988); *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n.43 (1972); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 82 (1871)).

[135] *Id.* (citing *Tynen*, 78 U.S. (11 Wall.) at 92).

[136] *Id.* at 703-04 (citing, *inter alia*, *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936); *Tynen*, 78 U.S. (11 Wall.) at 92).

[137] *Id.* at 704 n.19.

Attachment A

We and the Fifth Circuit agree that the gaming provisions of the Restoration Act cannot be read in harmony with the IGRA.[138]

The Fifth Circuit concluded that, by enacting the Restoration Act, "Congress . . . intended for Texas' gaming laws and regulations to operate as surrogate federal law on the Tribe's reservation in Texas."[139] Approximately one year later, however, in enacting the IGRA, Congress "expressly preempt[ed] the field in the governance of gaming activities on Indian lands"[140] by creating a nationwide regulatory framework that "struck a 'finely-tuned balance between the interests of the states and the tribes' to remedy the *Cabazon Band* prohibition on state regulation of Indian gaming."[141] If, as the Fifth Circuit concluded, Section 107(a) was enacted to serve as surrogate federal law on the Tribe's reservation, and the IGRA was enacted to "expressly preempt the field" and to "str[ike] a 'finely-tuned balance between the interests of the states and the tribes,'" then Section 107(a) cannot be harmonized with the IGRA.

Although the Department, too, concludes that the Restoration Act and the IGRA cannot be reconciled, we respectfully follow a different path than did the Fifth Circuit. We interpret Section 107(a) as codifying the distinction, set forth in *Cabazon* and enacted in the IGRA, between civil/regulatory laws and criminal/prohibitory laws. In Section 107(a), Congress ensured that gaming prohibited by the State of Texas could not take place on the Tribe's reservation and tribal lands.[142] Under this interpretation, Section 107(a), in and of itself, is not repugnant to the IGRA.

However, the Restoration Act and the IGRA provide for different remedies for gaming conducted in violation of their provisions. The Restoration Act provides that violations of Section 107(a) "shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas."[143] Furthermore, the Restoration Act provides the State with an independent avenue for enforcement of a violation of Section 107(a), to wit, an equitable action in Federal district court to enjoin gaming on the Tribe's reservation or tribal lands that violates Section 107(a).[144] The IGRA and its implementing regulations, on the other hand, provide for an entirely different enforcement scheme.[145]

---

[138] *See* Part II.A, *supra*.

[139] *Ysleta del Sur*, 36 F.3d at 1334.

[140] 1988 Senate IGRA Report, *supra* note 36, at 6.

[141] *Texas v. United States*, 497 F.3d 491, 506-507 (5th Cir. 2007) (quoting *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1988)); *see also Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523, 526 (D.S.D. 1993) (citing 1988 Senate IGRA Report, *supra* note 36), *aff'd* 3 F.3d 273 (8th Cir. 1993).

[142] We are aware that the Fifth Circuit expressly rejected this interpretation. *Ysleta del Sur*, 36 F.3d at 1333-34. As set forth *supra*, the Department, as the agency with responsibility for implementing the Restoration Act, may adopt an alternative interpretation.

[143] Restoration Act, *supra* note 2, § 107(a).

[144] *Id.* § 107(c).

[145] 18 U.S.C. §§ 1166-1168 (IGRA criminal laws and penalties; 25 U.S.C. § 2706(b)(10) (NIGC has authority to promulgate regulations for implementation of the IGRA; 25 U.S.C. § 2713 (civil penalties for violation of the IGRA); 25 C.F.R. Part 573 (Compliance and Enforcement); 25 C.F.R. Part 575 (Civil Fines).

Because the enforcement regime provided in Section 107 of the Restoration Act cannot be reconciled with the enforcement regime provided in the IGRA, we conclude that the two statutes are repugnant to one another.

D. In the conflict between Section 107 of the Restoration Act and the IGRA, the IGRA prevails, thus impliedly repealing Section 107.

As the Fifth Circuit noted in *Ysleta del Sur*, "repeals by implication are not favored."[146] Nonetheless, when two statutes cannot be reconciled, one must prevail over the other.[147] Here, our analysis diverges more sharply from that of the Fifth Circuit.

The general rule, as set forth by the *Narragansett* court, is that "where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[148] In the conflict between Section 107 of the Restoration Act and the IGRA, this general rule suggests, absent good cause to the contrary, that the IGRA prevails. In addition, in its analysis of the interplay between the Restoration Act and the IGRA, not only did the Fifth Circuit neglect to apply or even acknowledge the Indian canon, it also failed to employ or even acknowledge "the general rule . . . that where two acts are in irreconcilable conflict, the later act prevails to the extent of the impasse."[149] IGRA was enacted approximately one year after the Restoration Act.

The Fifth Circuit held that the Restoration Act prevails because it, being applicable to only two tribes in a single state, is a specific statute and the IGRA, being of nationwide application, is a general statute.[150] However, the IGRA also is a specific statute because it is specifically directed to the issue of Indian gaming, while the Restoration Act is a general statute because its primary purpose is to restore the Federal trust relationship, with gaming constituting only one part of that statute. The district court in *Narragansett* concluded as much with respect to the Rhode Island Settlement Act.[151] Moreover, where "the enacting Congress is demonstrably aware of the earlier law at the time of the later law's enactment, there is no basis for indulging the presumption" that Congress did not intend its later statute to act upon the earlier one.[152]

In addition, our conclusion that the IGRA prevails preserves the core of both acts. The primary purpose of the Restoration Act was to restore the Federal trust relationship and Federal services and assistance to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas.[153] The Act's gaming provisions were enacted to fill a legal and jurisdictional void that existed at that time, before the IGRA was enacted.[154] Consequently, an interpretation of the two

---

[146] *Ysleta del Sur*, 36 F.3d at 1335 (quoting *Crawford Fitting*, 482 U.S. at 442).

[147] *Narragansett*, 19 F.3d at 703.

[148] *Id.* at 704.

[149] *Narragansett*, 19 F.3d at 704 (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)).

[150] *Ysleta del Sur*, 36 F.3d at 1335.

[151] *Rhode Island v. Narragansett Tribe of Indians*, 816 F. Supp. 796, 804 (D.R.I. 1993) (holding that, for purposes of gaming, the IGRA is a specific act and the tribe's settlement act is a general act), *aff'd* 19 F.3d 685.

[152] *Narragansett*, 19 F.3d at 704 n.21.

[153] Restoration Act, *supra* note 2, Title.

[154] *See* Part I.B, *supra*.

Attachment A

statutes that finds that the IGRA impliedly repeals Section 107 of the Restoration Act nevertheless leaves the core of the Restoration Act intact.[155] Moreover, the IGRA filled the legal and jurisdictional gap that existed at the time the Restoration Act was enacted, further mitigating any harm from finding an implied repeal of Section 107. On the other hand, the IGRA by its plain language was intended to apply to all Indian tribes,[156] and one of its stated purposes was "to expressly preempt the field in the governance of gaming activities on Indian lands"[157] Although Congress has expressly exempted certain tribes from the operation of the IGRA,[158] to find such an exemption without any express statutory exemption would undermine the goal of a "comprehensive regulatory framework"[159] the IGRA.

Finally, our conclusion that the IGRA effects an implied repeal of the gaming provisions of the Restoration Act is the only conclusion that is consistent with the Indian canon of construction. When choosing between two reasonable interpretations of a statute enacted for the benefit of Indians, the Indian canon itself is not dispositive of the issue, but rather, it is an essential lens through which statute's text, "the 'surrounding circumstances,' and the 'legislative history' are to be examined."[160] The IGRA is a statute enacted for the benefit of Indians and Indian tribes.[161] Although the Fifth Circuit had previously recognized the role that the Indian canon plays in interpreting statutes enacted for the benefit of Indian tribes,[162] it did not employ, or even acknowledge, the relevance of the Indian canon to the determination of whether the IGRA governs gaming on the Tribe's reservation and tribal lands. Therefore, we depart from the Fifth Circuit and apply the construction that favors the Tribe.

We conclude that the IGRA effects an implied repeal of Section 107 of the Restoration Act. In doing so, however, we note that our opinion does nothing to undermine the gaming prohibitions that currently exist in Texas law. The State already provides for bingo, which is the functional equivalent of the Class II gaming governed by the gaming ordinance that the Tribe submitted to

---

[155] *Cf. Narragansett*, 19 F.3d at 704 (reading the IGRA and the settlement act at issue such that the IGRA prevailed "leaves the heart of the Settlement Act untouched").

[156] 25 U.S.C. § 2703(5) ("The term 'Indian tribe' means *any* Indian tribe, band, nation, or other organized group or community of Indians which – (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and (B) is recognized as possessing powers of self-government" (emphasis added).).

[157] 1988 Senate IGRA Report, *supra* note 36, at 6.

[158] *See, e.g.*, 25 U.S.C. § 9411 (the IGRA does not apply to the Catawba Indian Tribe of South Carolina); 25 U.S.C. § 1708(b) (Narragansett settlement lands are not "Indian lands" for purposes of the IGRA); *see also Passamaquoddy*, 75 F.3d 784 (holding that savings clause in the Maine Indian Claims Settlement Act, paired with the IGRA's lack of any specific reference to any applicability in the State of Maine, effectively exempted tribes within the State of Maine from operation of the IGRA).

[159] *Wells Fargo Bank*, 658 F.3d at 687.

[160] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

[161] 25 U.S.C. § 2702(1) (among purposes of the IGRA is to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments"); *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003) ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes" (citing IGRA's declaration of policy contained in 25 U.S.C. § 2702(1))).

[162] *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 316 (1981) ("The Supreme Court . . . has stated that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians" (quoting *Bryan*, 426 U.S. at 392)).

the NIGC. Under the IGRA, the Tribe may not engage in Class III gaming unless it first reaches a compact with the State. In other words, our conclusion that the IGRA governs gaming on the Tribe's reservation and tribal lands preserves the authority of both the Tribe and the State to pursue their respective public policies toward gaming.

III. CONCLUSION

A comprehensive reading of the interplay between the Restoration Act and the IGRA leads us to conclude that the IGRA applies to the Ysleta del Sur Pueblo. The Restoration Act was enacted in order to restore the Federal trust relationship with the Ysleta del Sur Pueblo and the Alabama and Coushatta Tribes in Texas. Because it was enacted when there was a great deal of uncertainty concerning the law of Indian gaming, section 107 of the Act was drafted to fill any gap in the law. That gap, however, was subsequently filled by the enactment of the IGRA, scarcely one year after the Restoration Act.

Because Section 107 of the Restoration Act contains enforcement provisions that are at odds with the IGRA, the two statutes cannot be harmonized. In that conflict, the IGRA prevails and effects an implied repeal of Section 107 of the Restoration Act. Our conclusion is consistent with the rule that favors the later-enacted statute, which in this case is the IGRA. In addition, an implied repeal of Section 107 leaves the core of the Restoration Act intact, while an implied exception to the IGRA would undermine the national regulatory scheme at that statute's core, and undermine its goal of providing opportunities for tribal economic development. This interpretation is consistent with the text of the IGRA, the legislative histories of both the Restoration Act and the IGRA, and the Indian canon of construction.

Therefore, in answer to your question, we conclude that the Restoration Act does not prohibit the Ysleta del Sur Pueblo from gaming on its Indian lands under IGRA.

Sincerely,

Venus McGhee Prince
Deputy Solicitor for Indian Affairs

Attachment A

25 USC CHAPTER 19, SUBCHAPTER V: MASSACHUSETTS INDIAN LAND CLAIMS SETTLEMENT

From Title 25—INDIANS
CHAPTER 19—INDIAN LAND CLAIMS SETTLEMENTS

SUBCHAPTER V—MASSACHUSETTS INDIAN LAND CLAIMS SETTLEMENT

§1771. Congressional findings and declaration of policy

The Congress hereby finds and declares that—

(1) there is pending before the United States District Court for the District of Massachusetts a lawsuit that involves Indian claims to certain public lands within the town of Gay Head, Massachusetts;

(2) the pendency of this lawsuit has resulted in severe economic hardships for the residents of the town of Gay Head by clouding the titles to much of the land in the town, including land not involved in the lawsuit;

(3) the Congress shares with the Commonwealth of Massachusetts and the parties to the lawsuit a desire to remove all clouds on titles resulting from such Indian land claim; [1]

(4) the parties to the lawsuit and others interested in settlement of Indian land claims within the Commonwealth of Massachusetts executed a Settlement Agreement which, to become effective, requires implementing legislation by the Congress of the United States and the General Court of the Commonwealth of Massachusetts;

(5) the town of Gay Head has agreed to contribute approximately 50 percent of the land involved in this settlement;

(6) the State of Massachusetts has agreed to provide up to $2,250,000 to be used for the purchase of land to be held in trust by the Secretary for the use and benefit of the Wampanoag Tribal Council of Gay Head, Inc.; and

(7) the Secretary has acknowledged the existence of the Wampanoag Tribal Council of Gay Head, Inc. as an Indian tribe and Congress hereby ratifies and confirms that existence as an Indian tribe with a government to government relationship with the United States.

(Pub. L. 100–95, §2, Aug. 18, 1987, 101 Stat. 704.)

Effective Date

Pub. L. 100–95, §11, Aug. 18, 1987, 101 Stat. 710, provided that:

"(a) In General.—Except as provided in subsection (b), this Act [enacting this subchapter] shall take effect upon the date of enactment [Aug. 18, 1987].

"(b) Exception.—Section 4 [25 U.S.C. 1771b] shall take effect upon the date on which the title of all of the private settlement lands provided for in this Act to the Wampanoag Tribal Council of Gay Head, Inc. is transferred. The fact of such transfer, and the date thereof, shall be certified and recorded by the Secretary of the Commonwealth of Massachusetts."

Short Title

Pub. L. 100–95, §1, Aug. 18, 1987, 101 Stat. 704, provided that: "This Act [enacting this subchapter] may be cited as the 'Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987'."

[1] *So in original. Probably should be "claims;".*

§1771a. Gay Head Indian claims settlement fund

(a) Fund established

There is hereby established within the Treasury of the United States a fund to be known as the "Wampanoag Tribal Council of Gay Head, Inc. Claims Settlement Fund". Amounts in the fund shall be available to the Secretary to carry out the purposes of this subchapter.

(b) Authorization for appropriation

There is hereby authorized to be appropriated $2,250,000 for such fund to remain available until expended.

(c) State contribution required

Amounts may be expended from the fund only upon deposit by the State of Massachusetts into the fund of an amount equal to that amount to be expended by the United States so that both the United States and the State of Massachusetts bear one-half of the cost of the acquisition of lands under section 1771d of this title.

(Pub. L. 100–95, §3, Aug. 18, 1987, 101 Stat. 704.)

§1771b. Approval of prior transfers and extinguishment of aboriginal title and claims of Gay Head Indians

(a) Approval of prior transfers

(1) Any transfer before August 18, 1987, of land or natural resources now located anywhere within the United States from, by, or on behalf of the Wampanoag Tribal Council of Gay Head, Inc., or (2) any transfer before August 18, 1987, by, from, or on behalf of any Indian, Indian nation, or tribe or band of Indians, of any land or natural resources located anywhere within the town of Gay Head, Massachusetts, including any transfer pursuant to any statute of the State, and the incorporation of the town of Gay Head, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians (including the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof). Any such transfer and any transfer in implementation of this subchapter, shall be deemed to have been made with the consent and approval of Congress as of the date of such transfer.

(b) Extinguishment of aboriginal title

Any aboriginal title held by the Wampanoag Tribal Council of Gay Head, Inc. or any other entity presently or at any time in the past known as the Gay Head Indians, to any land or natural resources the transfer of which is consented to and approved in subsection (a) is considered extinguished as of the date of such transfer.

(c) Extinguishment of claims arising from prior transfers or extinguishment of aboriginal title

Any claim (including any claim for damages for use and occupancy) by the Wampanoag Tribal Council of Gay Head, Inc., the Gay Head Indians, or any other Indian, Indian nation, or tribe or band of Indians against the United States, any State or political subdivision of a State, or any other person which is based on—

(1) any transfer of land or natural resources which is consented to and approved in subsection (a), or

(2) any aboriginal title to land or natural resources the transfer of which is consented to and approved in subsection (b),

is extinguished as of the date of any such transfer.

(d) Personal claims not affected

No provision of this section shall be construed to offset or eliminate the personal claim of any individual Indian which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(Pub. L. 100–95, §4, Aug. 18, 1987, 101 Stat. 705.)

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), referred to in subsec. (a), is not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

Effective Date

Section effective upon the date on which title of all of private settlement lands provided for in this subchapter to the Wampanoag Tribal Council of Gay Head, Inc. is transferred, with fact of such transfer, and date thereof, to be certified and recorded by Secretary of the Commonwealth of Massachusetts, see section 11(b) of Pub. L. 100–95, set out as a note under section 1771 of this title.

§1771c. Conditions precedent to Federal purchase of settlement lands

(a) Initial determination of State and local action

No action shall be taken by the Secretary under section 1771d of this title before the Secretary publishes notice in the Federal Register of the determination by the Secretary that—

(1) the Commonwealth of Massachusetts has enacted legislation which provides that—

(A) the town of Gay Head, Massachusetts, is authorized to convey to the Secretary to be held in trust for the Wampanoag Tribal Council of Gay Head, Inc. the public settlement lands and the Cook lands subject to the conditions and limitations set forth in the Settlement Agreement; and

(B) the Wampanoag Tribal Council of Gay Head, Inc. shall have the authority, after consultation with appropriate State and local officials, to regulate any hunting by Indians on the settlement lands that is conducted by means other than firearms or crossbow to the extent provided in, and subject to the conditions and limitations set forth in, the Settlement Agreement;

(2) the Wampanoag Tribal Council of Gay Head, Inc., has submitted to the Secretary an executed waiver or waivers of the claims covered by the Settlement Agreement all claims extinguished by this subchapter, and all claims arising because of the approval of transfers and extinguishment of titles and claims under this subchapter; and

(3) the town of Gay Head, Massachusetts, has authorized the conveyance of the public settlement lands and the Cook Lands [1] to the Secretary in trust for the Wampanoag Tribal Council of Gay Head, Inc.

(b) Reliance upon Attorney General of Massachusetts

In making the findings required in subsection (a) of this section, the Secretary may rely upon the opinion of the Attorney General of the Commonwealth of Massachusetts.

(Pub. L. 100–95, §5, Aug. 18, 1987, 101 Stat. 705.)

[1] *So in original. Probably should not be capitalized.*

§1771d. Purchase and transfer of settlement lands

(a) Purchase of private settlement lands

The Secretary is authorized and directed to expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., $2,125,000 to acquire the private settlement lands. At the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall not purchase lots 705, 222, and 528 of the private settlement lands, but, at the request of the Wampanoag Tribal Council of Gay Head, Inc., the Secretary shall acquire in lieu thereof such other lands that are contiguous to the remaining private settlement lands. Upon the purchase of such contiguous lands, those lands shall be subject to the same restrictions and benefits as the private settlement lands.

(b) Payment for survey and appraisal

The Secretary is authorized and directed to cause a survey of the public settlement lands to be made within 60 days of acquiring title to the public settlement lands. The Secretary shall reimburse the Native American Rights Fund and the Gay Head Taxpayers Association for an appraisal of the private settlement lands done by Paul O'Leary dated May 1, 1987. Such funds as may be necessary may be withdrawn from the Fund [1] established in section 1771a(a) of this title and may be used for the purpose of conducting the survey and providing reimbursement for the appraisal.

(c) Acquisition of additional lands

The Secretary shall expend, at the request of the Wampanoag Tribal Council of Gay Head, Inc., any remaining funds not required by subsection (a) or (b) to acquire any additional lands that are contiguous to the private settlement lands. Any lands acquired pursuant to this section, and any other lands which are on and after August 12, 1987, held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to this subchapter, the Settlement Agreement and other applicable laws. Any after acquired land held in trust for the Wampanoag Tribal Council of Gay Head, Inc., any successor, or individual member, shall be subject to the same benefits and restrictions as apply to the most analogous land use described in the Settlement Agreement.

(d) Transfer and survey of land to Wampanoag Tribal Council

Any right, title, or interest to lands acquired by the Secretary under this section, and the title to public settlement lands conveyed by the town of Gay Head, shall be held in trust for the Wampanoag Tribal Council of Gay Head, Inc. and shall be subject to this subchapter, the Settlement Agreement, and other applicable laws.

(e) Proceedings authorized to acquire or to perfect title

The Secretary is authorized to commence such condemnation proceedings as the Secretary may determine to be necessary—

(1) to acquire or perfect any right, title, or interest in any private settlement land, and

(2) to condemn any interest adverse to any ostensible owner of such land.

(f) Public settlement lands held in trust

The Secretary is authorized to accept and hold in trust for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. the public settlement lands as described in section 1771f(7) of this title immediately upon the effective date of this Act.

(g) Application

The terms of this section shall apply to land in the town of Gay Head. Any land acquired by the Wampanoag Tribal Council of Gay Head, Inc., that is located outside the town of Gay Head shall be subject to all the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts.

(h) Spending authority

Any spending authority (as defined in section 651(c)(2) [2] of title 2) provided in this section shall be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

(Pub. L. 100–95, §6, Aug. 18, 1987, 101 Stat. 706.)

References in Text

For the effective date of this Act, referred to in subsec. (f), see section 11 of Pub. L. 100–95, set out as a note under section 1771 of this title.

Section 651 of title 2, referred to in subsec. (h), was amended by Pub. L. 105–33, title X, §10116(a)(3), (5), Aug. 5, 1997, 111 Stat. 691, by striking out subsec. (c) and redesignating former subsec. (d) as (c).

[1] *So in original. Probably should not be capitalized.*

[2] *See References in Text note below.*

§1771e. Jurisdiction over settlement lands; restraint on alienation

(a) Limitation on Indian jurisdiction over settlement lands

The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and shall not exercise any jurisdiction over any part of the settlement lands in contravention of this subchapter, the civil regulatory and criminal laws of the Commonwealth of Massachusetts, the town of Gay Head, Massachusetts, and applicable Federal laws.

(b) Subsequent holder bound to same terms and conditions

Any tribe or tribal organization which acquires any settlement land or any other land that may now or in the future be owned by or held in trust for any Indian entity in the town of Gay Head, Massachusetts, from the Wampanoag Tribal Council of Gay Head, Inc. shall hold such beneficial interest to such land subject to the same terms and conditions as are applicable to such lands when held by such council.

(c) Reservations of right and authority relating to settlement lands

No provision of this subchapter shall affect or otherwise impair—

(1) any authority to impose a lien or temporary seizure on the settlement lands as provided in the State Implementing Act;

(2) the authority of the Secretary to approve leases in accordance with sections 415 to 415d of this title; or

(3) the legal capacity of the Wampanoag Tribal Council of Gay Head, Inc. to transfer the settlement lands to any tribal entity which may be organized as a successor in interest to Wampanoag Tribal Council of Gay Head, Inc. or to transfer—

(A) the right to use the settlement lands to its members,

(B) any easement for public or private purposes in accordance with the laws of the Commonwealth of Massachusetts or the ordinances of the town of Gay Head, Massachusetts, or

(C) title to the West Basin Strip to the town of Gay Head, Massachusetts, pursuant to the terms of the Settlement Agreement.

(d) Exemption from State assessment

Any land held in trust by the Secretary for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. shall be exempt from taxation or lien or "in lieu of payment" or other assessment by the State or any political subdivision of the State to the extent provided by the Settlement Agreement: *Provided, however*, That such taxation or lien or "in lieu of payment" or other assessment will only apply to lands which are zoned and utilized as commercial: *Provided further*, That this section shall not be interpreted as restricting the Tribe from entering into an agreement with the town of Gay Head to reimburse such town for the delivery of specific public services on the tribal lands.

(Pub. L. 100–95, §7, Aug. 18, 1987, 101 Stat. 707.)

References in Text

Sections 415 to 415d of this title, referred to in subsec. (c)(2), was in the original "the Act entitled 'An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases', approved August 9, 1955 (25 U.S.C. 415 et seq.)", which enacted sections 415 to 415d of this title and amended section 396 of this title.

§1771f. Definitions

For the purposes of this subchapter:

(1) Cook lands

The term "Cook lands" means the lands described in paragraph (5) of the Settlement Agreement.

(2) Wampanoag Tribal Council of Gay Head, Inc.

The term "Wampanoag Tribal Council of Gay Head, Inc." means the tribal entity recognized by the Secretary of the Interior as having a government to government relationship with the United States. The Wampanoag Tribal Council of Gay Head, Inc. is the sole and legitimate tribal entity which has a claim under the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), to land within the town of Gay Head. The membership of the Wampanoag Tribal Council of Gay Head, Inc., includes those 521 individuals who have been recognized by the Secretary of the Interior as being members of the Wampanoag Tribal Council of Gay Head, Inc., and such Indians of Gay Head ancestry as may be added from time to time by the governing body of the Wampanoag Tribal Council of Gay Head, Inc.: *Provided*, That nothing in this section shall prevent the voluntary withdrawal from membership in the Wampanoag Tribal Council of Gay Head, Inc., pursuant to procedures established by the Tribe. The governing body of the Wampanoag Tribal Council of Gay Head, Inc. is hereby authorized to act on behalf of and bind the Wampanoag Tribal Council of Gay Head, Inc., in all matters related to carrying out this subchapter.

(3) Fund

The term "fund" means the Wampanoag Tribal Council of Gay Head, Inc. Claims Settlement Fund established under section 1771a of this title.

(4) Land or natural resources

The term "land or natural resources" means any real property or natural resources or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish.

(5) Lawsuit

The term "lawsuit" means the action entitled Wampanoag Tribal Council of Gay Head, and others versus Town of Gay Head, and others (C.A. No. 74–5826–McN (D. Mass.)).

(6) Private settlement lands

The term "private settlement lands" means approximately 177 acres of privately held land described in paragraph 6 of the Settlement Agreement.

(7) Public settlement lands

The term "public settlement lands" means the lands described in paragraph (4) of the Settlement Agreement.

(8) Settlement lands

The term "settlement lands" means the private settlement lands and the public settlement lands.

(9) Secretary

The term "Secretary" means the Secretary of the Interior.

(10) Settlement Agreement

The term "Settlement Agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Gay Head, Massachusetts, Indian Land Claims," executed as of November 22, 1983, and renewed thereafter by representatives of the parties to the lawsuit, and as filed with the Secretary of the Commonwealth of Massachusetts.

(11) State implementing act

The term "State implementing act" means legislation enacted by the Commonwealth of Massachusetts conforming to the requirements of this subchapter and the requirements of the Massachusetts Constitution.

(12) Transfer

The term "transfer" includes—

(A) any sale, grant, lease, allotment, partition, or conveyance,

(B) any transaction the purpose of which is to effect a sale, grant, lease, allotment, partition, or conveyance, or

(C) any event or events that resulted in a change of possession or control of land or natural resources.

(13) West Basin Strip

The term "West Basin Strip" means a strip of land along the West Basin which the Wampanoag Tribal Council is authorized to convey, under paragraph (11) of the Settlement Agreement, to the town of Gay Head.

(Pub. L. 100–95, §8, Aug. 18, 1987, 101 Stat. 708.)

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, sec. 4, 1 Stat. 137), referred to in par. (2), is not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

§1771g. Applicability of State law

Except as otherwise expressly provided in this subchapter or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, shall be subject to the civil and criminal laws, ordinances, and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance).

(Pub. L. 100–95, §9, Aug. 18, 1987, 101 Stat. 709.)

§1771h. Limitations of action; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter shall be barred unless the complaint is filed within thirty days after August 18, 1987. Exclusive original jurisdiction over any such action and any proceedings under section 1771d(e) of this title is hereby vested in the United States District Court of [1] the District of Massachusetts.

(Pub. L. 100–95, §10, Aug. 18, 1987, 101 Stat. 710.)

[1] *So in original. Probably should be "for".*

§1771i. Eligibility

For the purpose of eligibility for Federal services made available to members of federally recognized Indian tribes, because of their status as Indians, members of this tribe residing on Martha's Vineyard, Massachusetts, shall be deemed to be living on or near an Indian reservation.

(Pub. L. 100–95, §12, Aug. 18, 1987, 101 Stat. 710.)

25 USC CHAPTER 19, SUBCHAPTER I: RHODE ISLAND INDIAN CLAIMS SETTLEMENT

From Title 25—INDIANS
CHAPTER 19—INDIAN LAND CLAIMS SETTLEMENTS

SUBCHAPTER I—RHODE ISLAND INDIAN CLAIMS SETTLEMENT

PART A—GENERAL PROVISIONS

§1701. Congressional findings and declaration of policy

Congress finds and declares that—

(a) there are pending before the United States District Court for the District of Rhode Island two consolidated actions that involve Indian claims to certain public and private lands within the town of Charlestown, Rhode Island;

(b) the pendency of these lawsuits has resulted in severe economic hardships for the residents of the town of Charlestown by clouding the titles to much of the land in the town, including lands not involved in the lawsuits;

(c) the Congress shares with the State of Rhode Island and the parties to the lawsuits a desire to remove all clouds on titles resulting from such Indian land claims within the State of Rhode Island; and

(d) the parties to the lawsuits and others interested in the settlement of Indian land claims within the State of Rhode Island have executed a Settlement Agreement which requires implementing legislation by the Congress of the United States and the legislature of the State of Rhode Island.

(Pub. L. 95–395, §2, Sept. 30, 1978, 92 Stat. 813.)

SHORT TITLE

Pub. L. 95–395, §1, Sept. 30, 1978, 92 Stat. 813, provided: "That this Act [enacting this subchapter] may be cited as the 'Rhode Island Indian Claims Settlement Act'."

For short title of Pub. L. 96–420, which enacted subchapter II of this chapter, as the "Maine Indian Claims Settlement Act of 1980", see section 1 of Pub. L. 96–420, set out as a note under section 1721 of this title.

For short title of Pub. L. 97–399, which enacted subchapter III of this chapter, as the "Florida Indian Land Claims Settlement Act of 1982", see section 1 of Pub. L. 97–399, set out as a note under section 1741 of this title.

For short title of Pub. L. 98–134, which enacted subchapter IV of this chapter, as the "Mashantucket Pequot Indian Claims Settlement Act", see section 1 of Pub. L. 98–134, set out as a note under section 1751 of this title.

For short title of Pub. L. 100–95, which enacted subchapter V of this chapter, as the "Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987", see section 1 of Pub. L. 100–95, set out as a note under section 1771 of this title.

For short title of Pub. L. 100–228, which enacted subchapter VI of this chapter, as the "Seminole Indian Land Claims Settlement Act of 1987", see section 1 of Pub. L. 100–228, set out as a note under section 1772 of this title.

For short title of Pub. L. 101–41, which enacted subchapter VII of this chapter, as the "Puyallup Tribe of Indians Settlement Act of 1989", see section 1 of Pub. L. 101–41, set out as a note under section 1773 of this title.

For short title of Pub. L. 101–503, which enacted subchapter VIII of this chapter, as the "Seneca Nation Settlement Act of 1990", see section 1 of Pub. L. 101–503, set out as a note under section 1774 of this title.

For short title of Pub. L. 103–377, which enacted subchapter IX of this chapter, as the "Mohegan

Nation of Connecticut Land Claims Settlement Act of 1994", see section 1 of Pub. L. 103–377, set out as a note under section 1775 of this title.

For short title of Pub. L. 103–444, which enacted subchapter X of this chapter, as the "Crow Boundary Settlement Act of 1994", see section 1 of Pub. L. 103–444, set out as a note under section 1776 of this title.

For short title of Pub. L. 106–425, which enacted subchapter XI of this chapter, as the "Santo Domingo Pueblo Claims Settlement Act of 2000", see section 1 of Pub. L. 106–425, set out as a note under section 1777 of this title.

For short title of title VI of Pub. L. 106–568, which enacted subchapter XII of this chapter, as the "Torres-Martinez Desert Cahuilla Indians Claims Settlement Act", see section 601 of Pub. L. 106–568, set out as a note under section 1778 of this title.

For short title of title VI of Pub. L. 107–331, which enacted subchapter XIII of this chapter, as the "Cherokee, Choctaw, and Chickasaw Nations Claims Settlement Act", see section 601 of Pub. L. 107–331, set out as a note under section 1779 of this title.

For short title of Pub. L. 109–286, which enacted subchapter XIV of this chapter, as the "Pueblo de San Ildefonso Claims Settlement Act of 2005", see section 1 of Pub. L. 109–286, set out as a note under section 1780 of this title.

§1702. Definitions

For the purposes of this subchapter, the term—

(a) "Indian Corporation" means the Rhode Island nonbusiness corporation known as the "Narragansett Tribe of Indians";

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to, minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish;

(c) "lawsuits" means the actions entitled "Narragansett Tribe of Indians v. Southern Rhode Island Land Development Co., et al., C.A. No. 75–0006 (D.R.I.)" and "Narragansett Tribe of Indians v. Rhode Island Director of Environmental Management, C.A. No. 75–0005 (D.R.I.)";

(d) "private settlement lands" means approximately nine hundred acres of privately held land outlined in red in the map marked "Exhibit A" attached to the Settlement Agreement that are to be acquired by the Secretary from certain private landowners pursuant to sections 1704 and 1707 of this title;

(e) "public settlement lands" means the lands described in paragraph 2 of the Settlement Agreement that are to be conveyed by the State of Rhode Island to the State Corporation pursuant to legislation as described in section 1706 of this title;

(f) "settlement lands" means those lands defined in subsections (d) and (e) of this section;

(g) "Secretary" means the Secretary of the Interior;

(h) "settlement agreement" means the document entitled "Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims", executed as of February 28, 1978, by representatives of the State of Rhode Island, of the town of Charlestown, and of the parties to the lawsuits, as filed with the Secretary of the State of Rhode Island;

(i) "State Corporation" means the corporation created or to be created by legislation enacted by the State of Rhode Island as described in section 1706 of this title; and

(j) "transfer" includes but is not limited to any sale, grant, lease, allotment, partition, or conveyance, any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance, or any event or events that resulted in a change of possession or control of land or natural resources.

(Pub. L. 95–395, §3, Sept. 30, 1978, 92 Stat. 813.)

§1703. Rhode Island Indian Claims Settlement Fund; establishment

There is hereby established in the United States Treasury a fund to be known as the Rhode Island Indian Claims Settlement Fund into which $3,500,000 shall be deposited following the appropriation authorized by section 1710 of this title.

(Pub. L. 95–395, §4, Sept. 30, 1978, 92 Stat. 814.)

§1704. Option agreements to purchase private settlement lands

(a) Acceptance of option agreement assignments; reasonableness of terms and conditions

The Secretary shall accept assignment of reasonable two-year option agreements negotiated by the Governor of the State of Rhode Island or his designee for the purchase of the private settlement lands: *Provided*, That the terms and conditions specified in such options are reasonable and that the total price for the acquisition of such lands, including reasonable costs of acquisition, will not exceed the amount specified in section 1703 of this title. If the Secretary does not determine that any such option agreement is unreasonable within sixty days of its submission, the Secretary will be deemed to have accepted the assignment of the option.

(b) Amount of payment

Payment for any option entered into pursuant to subsection (a) shall be in the amount of 5 per centum of the fair market value of the land or natural resources as of the date of the agreement and shall be paid from the fund established by section 1703 of this title.

(c) Limitation on option fees

The total amount of the option fees paid pursuant to subsection (b) shall not exceed $175,000.

(d) Application of option fee

The option fee for each option agreement shall be applied to the agreed purchase price in the agreement if the purchase of the defendant's land or natural resources is completed in accordance with the terms of the option agreement.

(e) Retention of option payment

The payment for each option may be retained by the party granting the option if the property transfer contemplated by the option agreement is not completed in accordance with the terms of the option agreement.

(Pub. L. 95–395, §5, Sept. 30, 1978, 92 Stat. 814.)

§1705. Publication of findings

(a) Prerequisites; consequences

If the Secretary finds that the State of Rhode Island has satisfied the conditions set forth in section 1706 of this title, he shall publish such findings in the Federal Register and upon such publication—

(1) any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, and any transfer of land or natural resources located anywhere within the town of Charlestown, Rhode Island, by, from, or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in subsection (a) may involve land or natural resources to which the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof, or any other Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or right involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy) shall be regarded as extinguished as of the date of the transfer.

(b) Maintenance of action; remedy

Any Indian, Indian nation, or tribe of Indians (other than the Indian Corporation or any other entity presently or at any time in the past known as the Narragansett Tribe of Indians, or any predecessor or successor in interest, member or stockholder thereof) whose transfer of land or natural resources was approved or whose aboriginal title

or claims were extinguished by subsection (a) of this section may, within a period of one hundred and eighty days after publication of the Secretary's findings pursuant to this section, bring an action against the State Corporation in lieu of an action against any other person against whom a cause may have existed in the absence of this section. In any such action, the remedy shall be limited to a right of possession of the settlement lands.

(Pub. L. 95–395, §6, Sept. 30, 1978, 92 Stat. 815.)

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790, ch. 33, sec. 4, 1 Stat. 137, referred to in subsec. (a)(1), was not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

§1706. Findings by Secretary

Section 1705 of this title shall not take effect until the Secretary finds—

(a) that the State of Rhode Island has enacted legislation creating or authorizing the creation of a State chartered corporation satisfying the following criteria:

(1) the corporation shall be authorized to acquire, perpetually manage, and hold the settlement lands;

(2) the corporation shall be controlled by a board of directors, the majority of the members of which shall be selected by the Indian Corporation or its successor, and the remaining members of which shall be selected by the State of Rhode Island; and

(3) the corporation shall be authorized, after consultation with appropriate State officials, to establish its own regulations concerning hunting and fishing on the settlement lands, which need not comply with regulations of the State of Rhode Island but which shall establish minimum standards for the safety of persons and protection of wildlife and fish stock; and

(b) that State of Rhode Island has enacted legislation authorizing the conveyance to the State Corporation of land and natural resources that substantially conform to the public settlement lands as described in paragraph 2 of the Settlement Agreement.

(Pub. L. 95–395, §7, Sept. 30, 1978, 92 Stat. 816.)

§1707. Purchase and transfer of private settlement lands

(a) Determination by Secretary; assignment of settlement lands to State Corporation

When the Secretary determines that the State Corporation described in section 1706(a) of this title has been created and will accept the settlement lands, the Secretary shall exercise within sixty days the options entered into pursuant to section 1704 of this title and assign the private settlement lands thereby purchased to the State Corporation.

(b) Moneys remaining in fund

Any moneys remaining in the fund established by section 1703 of this title after the purchase described in subsection (a) shall be returned to the general Treasury of the United States.

(c) Duties and liabilities of United States upon discharge of Secretary's duties; restriction on conveyance of settlement lands; affect on easements for public or private purposes

Upon the discharge of the Secretary's duties under sections 1704, 1705, 1706, and 1707 of this title, the United States shall have no further duties or liabilities under this subchapter with respect to the Indian Corporation or its successor, the State Corporation, or the settlement lands: *Provided, however*, That if the Secretary subsequently acknowledges the existence of the Narragansett Tribe of Indians, then the settlement lands may not be sold, granted, or otherwise conveyed or leased to anyone other than the Indian Corporation, and no such disposition of the settlement lands shall be of any validity in law or equity, unless the same is approved by the Secretary pursuant to regulations adopted by him for that purpose: *Provided, however*, That nothing in this subchapter shall affect or otherwise impair the ability of the State Corporation to grant or otherwise convey (including any involuntary conveyance by means of eminent domain or condemnation proceedings) any easement for public or private purposes pursuant to the laws of the State of Rhode Island.

(Pub. L. 95–395, §8, Sept. 30, 1978, 92 Stat. 816.)

§1708. Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act

(a) In general

Except as otherwise provided in this subchapter, the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island.

(b) Treatment of settlement lands under Indian Gaming Regulatory Act

For purposes of the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.), settlement lands shall not be treated as Indian lands.

(Pub. L. 95–395, §9, Sept. 30, 1978, 92 Stat. 817; Pub. L. 104–208, div. A, title I, §101(d) [title III, §330], Sept. 30, 1996, 110 Stat. 3009–181, 3009-227.)

References in Text

The Indian Gaming Regulatory Act, referred to in subsec. (b), is Pub. L. 100–497, Oct. 17, 1988, 102 Stat. 2467, as amended, which is classified principally to chapter 29 (§2701 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2701 of this title and Tables.

Amendments

1996—Pub. L. 104–208 substituted "Applicability of State law; treatment of settlement lands under Indian Gaming Regulatory Act" for "Applicability of State law" in section catchline, designated existing provisions as subsec. (a) and inserted heading, and added subsec. (b).

§1709. Preservation of Federal benefits

Nothing contained in this subchapter or in any legislation enacted by the State of Rhode Island as described in section 1706 of this title shall affect or otherwise impair in any adverse manner any benefits received by the State of Rhode Island under the Federal Aid in Wildlife Restoration Act of September 2, 1937 (16 U.S.C. 669–669(i)), or the Federal Aid in Fish Restoration Act of August 9, 1950 (16 U.S.C. 777–777(k)).

(Pub. L. 95–395, §10, Sept. 30, 1978, 92 Stat. 817.)

References in Text

The Federal Aid in Wildlife Restoration Act of September 2, 1937, referred to in text, is act Sept. 2, 1937, ch. 899, 50 Stat. 917, as amended, also known as the Pittman-Robertson Wildlife Restoration Act, which is classified generally to chapter 5B (§669 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 669 of Title 16 and Tables.

The Federal Aid in Fish Restoration Act of August 9, 1950, referred to in text, is act Aug. 9, 1950, ch. 658, 64 Stat. 430, as amended, also known as the Dingell-Johnson Sport Fish Restoration Act and the Fish Restoration and Management Projects Act, which is classified generally to chapter 10B (§777 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 777 of Title 16 and Tables.

§1710. Authorization of appropriations

There is hereby authorized to be appropriated $3,500,000 to carry out the purposes of this subchapter.

(Pub. L. 95–395, §11, Sept. 30, 1978, 92 Stat. 817.)

§1711. Limitation of actions; jurisdiction

Notwithstanding any other provision of law, any action to contest the constitutionality of this subchapter shall be

barred unless the complaint is filed within one hundred and eighty days of September 30, 1978. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the District of Rhode Island.

(Pub. L. 95–395, §12, Sept. 30, 1978, 92 Stat. 817.)

§1712. Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians in Rhode Island

(a) Scope of applicability

Except as provided in subsection (b)—

(1) any transfer of land or natural resources located anywhere within the State of Rhode Island outside the town of Charlestown from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (other than transfers included in and approved by section 1705 of this title), including but not limited to a transfer pursuant to any statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by, or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve any such transfer effective as of the date of said transfer;

(2) to the extent that any transfer of land or natural resources described in paragraph (1) may involve land or natural resources to which such Indian, Indian nation, or tribe of Indians had aboriginal title, paragraph (1) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer; and

(3) by virtue of the approval of such transfers of land or natural resources effected by this subsection or an extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by any such Indian, Indian nation, or tribe of Indians, arising subsequent to the transfer and based upon any interest in or rights involving such land or natural resources (including but not limited to claims for trespass damages or claims for use and occupancy), shall be regarded as extinguished as of the date of the transfer.

(b) Exceptions

This section shall not apply to any claim, right, or title of any Indian, Indian nation, or tribe of Indians that is asserted in an action commenced in a court of competent jurisdiction within one hundred and eighty days of September 30, 1978: *Provided*, That the plaintiff in any such action shall cause notice of the action to be served upon the Secretary and the Governor of the State of Rhode Island.

(Pub. L. 95–395, §13, Sept. 30, 1978, 92 Stat. 817.)

References in Text

The Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, 1 Stat. 137), referred to in subsec. (a)(1), was not classified to the Code. See sections 177, 179, 180, 193, 194, 201, 229, 230, 251, 263, and 264 of this title.

Part B—Tax Treatment

§1715. Exemption from taxation

(a) General exemption

Except as otherwise provided in subsections (b) and (c), the settlement lands received by the State Corporation shall not be subject to any form of Federal, State, or local taxation while held by the State Corporation.

(b) Income-producing activities

The exemption provided in subsection (a) shall not apply to any income-producing activities occurring on the settlement lands.

(c) Payments in lieu of taxes

Nothing in this subchapter shall prevent the making of payments in lieu of taxes by the State Corporation for services provided in connection with the settlement lands.

(Pub. L. 95–395, title II, §201, as added Pub. L. 96–601, §5(a), Dec. 24, 1980, 94 Stat. 3498.)

Effective Date

Pub. L. 96–601, §5(b), Dec. 24, 1980, 94 Stat. 3499, provided that: "The amendment made by subsection (a) [enacting this part] shall take effect on September 30, 1978."

§1716. Deferral of capital gains

For purposes of title 26, any sale or disposition of private settlement lands pursuant to the terms and conditions of the settlement agreement shall be treated as an involuntary conversion within the meaning of section 1033 of title 26.

(Pub. L. 95–395, title II, §202, as added Pub. L. 96–601, §5(a), Dec. 24, 1980, 94 Stat. 3499; amended Pub. L. 99–514, §2, Oct. 22, 1986, 100 Stat. 2095.)

Amendments

1986—Pub. L. 99–514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954" wherever appearing, which for purposes of codification was translated as "title 26" thus requiring no change in text.

United States Code Annotated
Title 25. Indians
Chapter 19. Indian Land Claims Settlements
Subchapter II. Maine Indian Claims Settlement

25 U.S.C.A. § 1724

§ 1724. Maine Indian Claims Settlement and Land Acquisition Funds in the United States Treasury

Currentness

(a) Establishment of Maine Indian Claims Settlement Fund; amount

There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Settlement Fund in which $27,000,000 shall be deposited following the appropriation of sums authorized by section 1733 of this title.

(b) Apportionment of settlement fund; administration; investments; limitation on distributions; quarterly investment income payments; expenditures for aged members; cessation of trust responsibility following Federal payments

(1) One-half of the principal of the settlement fund shall be held in trust by the Secretary for the benefit of the Passamaquoddy Tribe, and the other half of the settlement fund shall be held in trust for the benefit of the Penobscot Nation. Each portion of the settlement fund shall be administered by the Secretary in accordance with reasonable terms established by the Passamaquoddy Tribe or the Penobscot Nation, respectively, and agreed to by the Secretary: *Provided*, That the Secretary may not agree to terms which provide for investment of the settlement fund in a manner not in accordance with section 162a of this title, unless the respective tribe or nation first submits a specific waiver of liability on the part of the United States for any loss which may result from such an investment: *Provided, further*, That until such terms have been agreed upon, the Secretary shall fix the terms for the administration of the portion of the settlement fund as to which there is no agreement.

(2) Under no circumstances shall any part of the principal of the settlement fund be distributed to either the Passamaquoddy Tribe or the Penobscot Nation, or to any member of either tribe or nation: *Provided, however*, That nothing herein shall prevent the Secretary from investing the principal of said fund in accordance with paragraph (1) of this subsection.

(3) The Secretary shall make available to the Passamaquoddy Tribe and the Penobscot Nation in quarterly payments, without any deductions except as expressly provided in section 1725(d)(2) of this title and without liability to or on the part of the United States, any income received from the investment of that portion of the settlement fund allocated to the respective tribe or nation, the use of which shall be free of regulation by the Secretary. The Passamaquoddy Tribe and the Penobscot Nation annually shall each expend the income from $1,000,000 of their portion of the settlement fund for the benefit of their respective members who are over the age of sixty. Once payments under this paragraph have been made to the tribe or nation, the United States shall have no further trust responsibility to the tribe or nation or their members with respect to the sums paid, any subsequent distribution of these sums, or any property or services purchased therewith.

(c) Establishment of Maine Indian Claims Land Acquisition Fund; amount

There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Land Acquisition Fund in which $54,500,000 shall be deposited following the appropriation of sums authorized by section 1733 of this title.

(d) Apportionment of land acquisition fund; expenditures for acquisition of land or natural resources; trust acreage; fee holdings; interests in corpus of trust for Houlton Band following termination of Band's interest in trust; agreement for acquisitions for benefit of Houlton Band: scope, report to Congress

The principal of the land acquisition fund shall be apportioned as follows:

(1) $900,000 to be held in trust for the Houlton Band of Maliseet Indians;

(2) $26,800,000 to be held in trust for the Passamaquoddy Tribe; and

(3) $26,800,000 to be held in trust for the Penobscot Nation.

The Secretary is authorized and directed to expend, at the request of the affected tribe, nation or band, the principal and any income accruing to the respective portions of the land acquisition fund for the purpose of acquiring land or natural resources for the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians and for no other purpose. The first 150,000 acres of land or natural resources acquired for the Passamaquoddy Tribe and the first 150,000 acres acquired for the Penobscot Nation within the area described in the Maine Implementing Act as eligible to be included within the Passamaquoddy Indian Territory and the Penobscot Indian Territory shall be held in trust by the United States for the benefit of the respective tribe or nation. The Secretary is also authorized to take in trust for the Passamaquoddy Tribe or the Penobscot Nation any land or natural resources acquired within the aforesaid area by purchase, gift, or exchange by such tribe or nation. Land or natural resources acquired outside the boundaries of the aforesaid areas shall be held in fee by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto. Land or natural resources acquired within the State of Maine for the Houlton Band of Maliseet Indians shall be held in trust by the United States for the benefit of the band: *Provided*, That no land or natural resources shall be so acquired for or on behalf of the Houlton Band of Maliseet Indians without the prior enactment of appropriate legislation by the State of Maine approving such acquisition: *Provided further*, That the Passamaquoddy Tribe and the Penobscot Nation shall each have a one-half undivided interest in the corpus of the trust, which shall consist of any such property or subsequently acquired exchange property, in the event the Houlton Band of Maliseet Indians should terminate its interest in the trust.

(4) The Secretary is authorized to, and at the request of either party shall, participate in negotiations between the State of Maine and the Houlton Band of Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band. Such agreement shall be embodied in the legislation enacted by the State of Maine approving the acquisition of such lands as required by paragraph (3). The agreement and the legislation shall be limited to:

(A) provisions providing restrictions against alienation or taxation of land or natural resources held in trust for the Houlton Band no less restrictive than those provided by this subchapter and the Maine Implementing Act for land or natural resources to be held in trust for the Passamaquoddy Tribe or Penobscot Nation;

(B) provisions limiting the power of the State of Maine to condemn such lands that are no less restrictive than the provisions of this subchapter and the Maine Implementing Act that apply to the Passamaquoddy Indian Territory and the Penobscot Indian Territory but not within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation;

(C) consistent with the trust and restricted character of the lands, provisions satisfactory to the State and the Houlton Band concerning:

(i) payments by the Houlton Band in lieu of payment of property taxes on land or natural resources held in trust for the band, except that the band shall not be deemed to own or use any property for governmental purposes under the Maine Implementing Act;

(ii) payments of other fees and taxes to the extent imposed on the Passamaquoddy Tribe and the Penobscot Nation under the Maine Implementing Act, except that the band shall not be deemed to be a governmental entity under the Maine Implementing Act or to have the powers of a municipality under the Maine Implementing Act;

(iii) securing performance of obligations of the Houlton Band arising after the effective date of agreement between the State and the band.

(D) provisions on the location of these lands.

Except as set forth in this subsection, such agreement shall not include any other provisions regarding the enforcement or application of the laws of the State of Maine. Within one year of October 10, 1980, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the status of these negotiations.

(e) Acquisitions contingent upon agreement as to identity of land or natural resources to be sold, purchase price and other terms of sale; condemnation proceedings by Secretary; other acquisition authority barred for benefit of Indians in State of Maine

Notwithstanding the provisions of sections 3113 and 3114(a) to (d) of Title 40, the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title, satisfactory to the Attorney General, in the United States and condemn interests adverse to the ostensible owner. Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.

(f) Expenditures for Tribe, Nation, or Band contingent upon documentary relinquishment of claims

The Secretary may not expend on behalf of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians any sums deposited in the funds established pursuant to the subsections (a) and (c) of this section unless and until he finds that authorized officials of the respective tribe, nation, or band have executed appropriate documents relinquishing all

claims to the extent provided by sections 1723, 1730, and 1731 of this title and by section 6213 of the Maine Implementing Act, including stipulations to the final judicial dismissal with prejudice of their claims.

(g) Transfer limitations of section 177 of this title inapplicable to Indians in State of Maine; restraints on alienation as provided in section; transfers invalid ab initio except for: State and Federal condemnations, assignments, leases, sales, rights-of-way, and exchanges

(1) The provisions of section 177 of this title shall not be applicable to (A) the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation, or tribe or band of Indians in the State of Maine, or (B) any land or natural resources owned by or held in trust for the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation or tribe or band of Indians in the State of Maine. Except as provided in subsections (d)(4) and (g)(2) of this section, such land or natural resources shall not otherwise be subject to any restraint on alienation by virtue of being held in trust by the United States or the Secretary.

(2) Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (A) takings for public uses consistent with the Maine Implementing Act, (B) takings for public uses pursuant to the laws of the United States, or (C) transfers of individual Indian use assignments from one member of the Passamaquoddy Tribe or Penobscot Nation to another member of the same tribe or nation, shall be void ab initio and without any validity in law or equity.

(3) Land or natural resources within the Passamaquoddy Indian Territory or the Penobscot Indian Territory or held in trust for the benefit of the Houlton Band of Maliseet Indians may, at the request of the respective tribe, nation, or band, be--

(A) leased in accordance with sections 415 to 415d of this title;

(B) leased in accordance with sections 396a to 396g of this title;

(C) sold in accordance with section 407 of this title;

(D) subjected to rights-of-way in accordance with sections 323 to 328 of this title;

(E) exchanged for other land or natural resources of equal value, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary for deposit in the land acquisition fund for the benefit of the affected tribe, nation, or band, as the circumstances require, so long as payment does not exceed 25 per centum of the total value of the interests in land to be transferred by the tribe, nation, or band; and

(F) sold, only if at the time of sale the Secretary has entered into an option agreement or contract of sale to purchase other lands of approximate equal value.

(h) Agreement on terms for management and administration of land or natural resources

Land or natural resources acquired by the Secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in accordance with terms established by the respective tribe or nation and agreed to by the Secretary in accordance with section 450f of this title, or other existing law.

(i) Condemnation of trust or restricted land or natural resources within Reservations: substitute land or monetary proceeds as medium of compensation; condemnation of trust land without Reservations: use of compensation for reinvestment in trust or fee held acreage, certification of acquisitions; State condemnation proceedings: United States as necessary party, exhaustion of State administrative remedies, judicial review in Federal courts, removal of action

(1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted status as the land taken. To the extent that the compensation is in the form of monetary proceeds, it shall be deposited and reinvested as provided in paragraph (2) of this subsection.

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. The proceeds from any such condemnation shall be deposited in the land acquisition fund established by subsection (c) of this section and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the respective tribe or nation shall designate, with the approval of the United States, and within thirty days of such reinvestment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land not acquired in trust shall be held in fee by the respective tribe or nation. The Secretary shall certify, in writing, to the Secretary of State of the State of Maine the location, boundaries, and status of the land acquired.

(3) The State of Maine shall have initial jurisdiction over condemnation proceedings brought under this section. The United States shall be a necessary party to any such condemnation proceedings. After exhaustion of all State administrative remedies, the United States is authorized to seek judicial review of all relevant matters in the courts of the United States and shall have an absolute right of removal, at its discretion, over any action commenced in the courts of the State.

(j) Federal condemnation under other laws; deposit and reinvestment of compensatory proceeds

When trust or restricted land or natural resources of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians are condemned pursuant to any law of the United States other than this subchapter, the proceeds paid in compensation for such condemnation shall be deposited and reinvested in accordance with subsection (i)(2) of this section.

CREDIT(S)

(Pub.L. 96-420, § 5, Oct. 10, 1980, 94 Stat. 1788.)

Notes of Decisions (1)

25 U.S.C.A. § 1724, 25 USCA § 1724
Current through P.L. 114-143. Also includes P.L. 114-145, 114-146, 114-148, and 114-151 to 114-154.

End of Document